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# Reforming the Death Penalty in Egypt: An Islamic Law Perspective

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REFORMING THE DEATH PENALTY IN EGYPT;  
AN ISLAMIC LAW PERSPECTIVE

GABER MOHAMED

Submitted to the faculty of Indiana University Maurer School of Law  
in partial fulfillment of the requirements  
for the degree  
Master of Laws – Thesis  
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the requirements for the degree of Master of Laws – Thesis.

Thesis Committee

A handwritten signature in black ink, appearing to read 'J. Hoffmann', with a long horizontal flourish extending to the right.

Professor Joseph L. Hoffmann

February 4, 2018

# **CONTENTS**

## **INTRODUCTION**

1. The Current Situation
2. The Legal Situation
3. Islamic Law and the Death Penalty
4. The Organization of the Paper

## **CHAPTER ONE: THE DEATH PENALTY IN THE EGYPTIAN LEGAL SYSTEM**

1. Historical Introduction
2. Egyptian Death Penalty Statutes
  - A. Egyptian Criminal Law No. 85 of 1937
  - B. Anti-Drug Law No. 182 of 1960
  - C. Military Rules Law No. 25 of 1966
  - D. Firearms Control Legislation No. 394 of 1954
  - E. Confronting Terrorism Law No. 95 of 2015
3. Criminal Procedures and the Death Penalty
4. The Courts and the Death Penalty
  - A. Felony Courts
  - B. Military Courts
  - C. Supreme State Security Courts
5. Ineligibility for the Death Penalty
  - A. Psychogenic Disorder
  - B. Infancy

**6. Mitigation, Commutation, and Lapse of the Death Penalty**

- A. Lapse of the Death Penalty by the Statute of Limitations
- B. Lapse of the Death Penalty by Presidential Clemency

**7. General Comments on the Death Penalty in Egypt**

**CHAPTER TWO: THE DEATH PENALTY IN ISLAMIC LAW**

**1. Preface**

- A. The Sources of Islamic Law
- B. Crime and Punishment Categories in Islamic Law
  - a. Hudud
  - b. Qisas
  - c. Ta'zir
- C. The Idea of Blood Money in Islamic Law

**2. Death Penalty Crimes in Islamic Law**

- A. Armed Robbery
- B. Armed Rebellion
- C. Adultery
- D. Apostasy
- E. Intentional Murder

**3. The Tendency of Islamic Law to Avoid the Imposition of the Death Penalty**

- A. Introduction
- B. Limiting the Death Penalty to Three Crimes
- C. The Exclusive Criminal Procedures for Harsh Criminal Sanctions
- D. The Impact of the Doubt Maxim on the Death Penalty
- E. The Difficulties and Sophistications of Required Witness Conditions
- F. The Right of the Victim's Family to Waive the Death Penalty
- G. Blood Money
- H. Categories of People Who Are Exempt from the Death Penalty
  - a. Parents Who Kill their Children
  - b. Parents Who Kill their Spouse
  - c. Relatives Who Kill Other Family Members

## **CHAPTER THREE: WHAT SHOULD EGYPTIAN CRIMINAL LAW LEARN FROM ISLAMIC LAW ABOUT THE IMPOSITION OF THE DEATH PENALTY?**

- 1. Introduction**
  - A. The Constitutional Obligation to follow Islamic Law
  - B. The Social Obligation to Follow the Rules of Islamic Law
  - C. The Contemporary Need to Follow Islamic Law on the Death Penalty
- 2. The Rules that Must Be Followed by Egyptian Law to Restrict the Imposition of the Death Penalty in Egypt Based on Islamic law**
  - A. Restricting the Death Penalty to Cases of Intentional Murder
  - B. The Victim's Family's Decision about the Death Penalty
  - C. The Blood Money Right
  - D. The Continuous Evolution of Legislation
- 3. Conclusion**

## **CONCLUSION AND RECOMMENDATIONS**

1. Why Should We Reform the Death Penalty in Egypt?
2. Why Islamic Law?
3. Recommendations

## **RESOURCES**

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## INTRODUCTION

### ➤ THE CURRENT SITUATION

Since the 2013 military coup in Egypt, the number of death penalty decisions by the Egyptian courts has been dramatically increasing in a way that has not happened before in modern Egyptian history. An Egyptian court in the governorate of Minya imposed 1,212 death sentences in March and April of 2016, after two trials arising from attacks on police stations in 2013 that left at least two police officers dead.<sup>1</sup> After receiving the Grand Mufti's opinion, the judge approved 220 of those death sentences. Another Egyptian criminal court handed down provisional death sentences against 188 defendants on December 2, 2014, the third case of such mass sentencing that year.<sup>2</sup> During the last three years, more than ninety persons were executed in Egypt. Furthermore, statistics show that there are more than 1,700 people who have been sentenced to death in the last ten years. There is an unmistakable relationship between the political crisis and the sharp increase in courts' use of capital punishment following several mass trials marred by grossly unfair procedures, with the number of death sentences jumping from 109 in 2013 to at least 509 in 2014.<sup>3</sup>

### ➤ THE LEGAL SITUATION

Article 2 of the Egyptian Constitution, which was first adopted in 1971 and still appears (in amended form) in the current Constitution that was adopted in 2014, states that the principles of Islamic law are the main sources of all legislation. There are numerous statutory provisions that

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<sup>1</sup> Human Rights Watch, *Egypt: 183 Death Sentences Confirmed in Minya Case Makes Mockery of Right to Fair Trial*, June 2014. Retrieved from; <https://www.hrw.org/news/2014/06/21/egypt-183-death-sentences-confirmed-minya>.

<sup>2</sup> Human Rights Watch, *Egypt: Judge Issues Mass Death Sentences Court Condemns 188 Defendants for Police Station Attack*, December 2014. Retrieved from; <https://www.hrw.org/news/2014/12/03/egypt-judge-issues-mass-death-sentences>.

<sup>3</sup> Amnesty International, *Death Sentences and Executions 2014*, March 2015. Retrieved from; <https://www.amnestyusa.org/reports/death-sentences-and-executions-2014/>.

prescribe the death penalty as a punishment, including Egyptian Criminal Law no. 85 of 1937, Military Rules Law no. 25 of 1966, Firearms Control Legislation no. 394 of 1954, Anti-Drug Law no. 182 of 1960, and the new Law no. 95 of 2015 for Confronting Terrorism. But all of the aforementioned laws, except for the Confronting Terrorism law, were enacted *before* Article 2 of the Egyptian Constitution declared that Sharia principles are the main source of legislation. In other words, the crimes that shall be punished by the death penalty in Egypt were mainly derived from the French legal system, prior to the adoption of the new Constitution, and not from Islamic law. Consequently, stating that capital punishment should be retained in Egyptian law because the laws are founded on Sharia rules is not commensurate with the time when these laws were enacted.

Additionally, stating that these crimes should be punished by the death penalty is an explicit violation of Article 2 of the Egyptian Constitution. Islamic law prefers lenity in cases that may allow for the death penalty as a possible punishment. This lenity principle is demonstrated by the fact that Islamic law only prescribes the death penalty for intentional homicides and also provides for alternative punishments. Even more evidence that Egyptian death penalty laws are not derived from Islamic law is that Egyptian law does not follow the stringent criminal procedures for applying the death penalty that are required by Islamic law. For example, Egyptian criminal procedure law does not allow the victim's family the right to choose a reconciliation process such as blood money, even though this is considered an important procedural rule for the imposition of the death penalty under Islamic law.

In conclusion, Egyptian criminal law, as well as the other codes that include the death penalty, were mainly derived from non-Islamic legal systems. Therefore, the religious argument for capital punishment, which is claimed by some death penalty proponents, is not compatible with the actual origins of the Egyptian legislation. In fact, religious arguments should be used by opponents of the death penalty to limit the scope application of capital punishment in Egypt.

## ➤ **ISLAMIC LAW AND THE DEATH PENALTY**

Under Islamic law, the only crime that may be punished by the death penalty is the crime of intentional murder. However, this punishment is generally disfavored; it is largely associated with the principle of lenity, and is often set aside in favor of an alternative punishment such as blood money. The Quran, which is the first source of Islamic law, uses the death penalty as a means to achieve the principle of retaliation; however, the same source also stated that forgiveness and lenity are much preferred over the death penalty. Also, the Prophet, the second source of Islamic law, commanded and urged the victim's family to forgive and accept blood money instead of seeking the death penalty in all of the cases that were presented before him.

In addition to the principle of lenity espoused by the prophet Mohamed, he also stated another important principle for applying punishments in general: "Avoid punishment in case of uncertainty or doubt." This principle is considered to be the main basis for the special procedural rules that must be followed in order to impose the death penalty under Islamic law. The scholars of Islamic law expanded on this principle to add many of the other sophisticated and complicated procedural rules that make the application of death penalty as difficult as possible, and encourage alternative punishments such as the blood money, to implement the principle of doubt in punishments. Additionally, these scholars have worked on developing both substantive and procedural rules for the imposition of the death penalty. For example, substantively, they excluded some specific people from being subject to the death penalty, such as minors or the mentally incapacitated. On the procedural side, they prescribed many conditions for the witnesses, the confession, the circumstances of time and place, and many other procedural rules, all in order to save the life of the person who otherwise might be sentenced to death without having the full intention to kill.

In addition to the substantive and procedural rules of the death penalty, Islamic law places the decision of whether to seek the death penalty in the hands of the victim's family. The family may choose to either waive the death penalty or receive blood money.

In conclusion, the primary sources of Islamic law – the Quran and the prophet's traditions – aim to limit the scope of the death penalty to very limited crimes in which the offender demonstrated his full intention for his actions to lead to the death of the victim. Other limiting factors include the principle of lenity and the doubt maxim, both of which lead to a preference to impose any sanction other than capital punishment. Islamic law schools understood the main philosophy of punishments and the purposes of Sharia, so they worked on developing criminal procedure theories to achieve the goals of avoiding the death penalty and substituting other possible penalties according to the community's needs and societies' requirements.

### ➤ **THE ORGANIZATION OF THE PAPER**

The main goal of this thesis is to reform the imposition of the death penalty in the Egyptian legal system through the tools and theories of Islamic law. This subject will be discussed in three main chapters: The first chapter will be a survey of the current application of the death penalty in the Egyptian legal system, including the death penalty's history, laws, courts, appeals, legal procedures, and general comments on the current application of the penalty. The second chapter will be about the death penalty in Islamic law – including the sources of Islamic law, the crimes that merit the death penalty, the procedural rules of the death penalty, the blood money right, the victim's family's right, and the maxim of legal doubt. The third chapter concerns the rules of Islamic law – which Egyptian law is supposed to follow – that should work to reform and restrict the application of the death penalty in Egypt. Finally, the last section includes recommendations for reforming the application of the death penalty in the Egyptian legal system through the tools and theories of Islamic law.

## Chapter One:

# The Death Penalty in the Egyptian Legal System

## ➤ HISTORICAL INTRODUCTION

The Egyptian legal system has incorporated the death penalty as a punishment from as early as the Pharaonic era to present day.<sup>1</sup>

However, historians have noted that the death penalty was abolished two times during the Pharaonic epoch. The first time was during the era of King Actisanes, who banished the death penalty entirely. The second time was during the era of King Sacabos, who abolished the death penalty and replaced it with the punishment of hard labor.<sup>1</sup> The abolition of the death penalty did not last for a long time, but even when the death penalty was in place, the Pharaonic people used methods of execution that were designed to decrease the painfulness of the penalty.<sup>2</sup>

After the Islamic conquest of Egypt, Islamic law was the main source that formed and created the Egyptian legal system – including the legislative, judicial, and executive aspects. Thus, the death penalty became a punishment for intentional murder, pursuant Islamic law, and for other crimes based on the political and social conditions of the time.<sup>3</sup>

Since the 18<sup>th</sup> century, the Egyptian legal system has begun a new era of reforming its legal codes based on non-religious or non-Islamic sources – and mainly based on the French legal system.<sup>4</sup> The first Egyptian criminal code that was codified and written was in 1883; it was mainly derived from

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<sup>1</sup> 'Ibid, Raouf, *Mabadiea Al Qism Ala'm mina al Altashriea' Al Iqabi Al Masry* (English, *The Egyptian penal legislation; the general section*), Nahdet Masr Press, (Cairo, 1964).

<sup>1</sup> Zanati, Mahmoud Salam, *Tarikh Al Qanun Al Masry* (English, *The History of The Egyptian Law*), Dar Al Nahda Al Arabia, (Cairo, 1973).

<sup>2</sup> Zanati, Mahmoud Salam, *Tarikh Al Qanun Al Masry; Al Huqba Al Furoniya* (English, *The History of The Egyptian Law; the Pharaonic Era*), Dar Al Nahda Al Arabia, (Cairo, 1973).

<sup>3</sup> Zanati, *supra* note 2 at 339.

<sup>4</sup> See more, Al Awa, Mohamed Selim, *Fi Usul Al Nizam Al Jinaei Al Islami* (English; *The Origins of the Islamic Criminal Legal System*), Nahdet Masr Press, (Cairo, 2006). Anderson, J. N. D, *Law Reform in the Muslim World*, London: Athlone Press, 1976. See, Jindī, 'Abd al-Ḥalīm, *Naḥwa Taqnīn Jadīd Lil-mu'āmalāt Wa-al-'uqūbāt Fī Al-fiqh Al-islāmī*, (English, *Toward a New Codification to The Civil and Penalty Codes of the Islamic Law*), al-Majlis al-A'lā lil-Shu'ūn al-Islāmīyah, (Cairo, 1974).

the French legal system to be consistent with the judicial system of this era. The 1883 Egyptian criminal code, which has no roots in the Islamic law, prescribed the death penalty as a punishment for several different crimes.<sup>5</sup>

The 1883 code was amended in 1903, and again in 1904, under the name of the National Penal Law. The National Penal Law of 1904 was mainly derived from the French, Indian, and Italian legal systems,<sup>6</sup> without referring to Islamic law sources. The 1904 law was repealed and replaced by Law no. 58 of 1937. The last Egyptian penal law of 1937 had no relationship with Islamic law sources whatsoever. Indeed, each of the aforementioned codes prescribed the death penalty for several different crimes.

On the constitutional side, the 1971 Egyptian Constitution initiated a new provision that – for the first time – explicitly declared Islamic law principles as a source of legislation. This provision, Article Two, was subsequently amended in 1980 to provide that Sharia is the main source.<sup>7</sup> Thus, all of the Egyptian criminal codes that were codified before 1971 were not required to be pursuant to Islamic law sources. In other words, the constitutional obligation that requires all legislation to be in line with Islamic law principles began with the 1971 constitution, after most of the Egyptian legislation and codes had already been enacted.

The Egyptian criminal codes that call for the death penalty extend it as a permissible punishment to more crimes than Islamic law alone would allow. But according to the above historical introduction of the Egyptian criminal code, the argument that defends the death penalty in Egyptian law on religious grounds is irrelevant. While some proponents of the death penalty support their position by arguing that to be against it is to breach Sharia rules and Islamic laws,<sup>8</sup> history shows that this

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<sup>5</sup> *Ibid*, supra note 1.

<sup>6</sup> *Id*, at 32-39.

<sup>7</sup> Constitution of the Arab Republic of Egypt (Dustur Juinhuriyat Misr al-Arabiya) [Egy const.] of September 11, 1971, art. 2.

<sup>8</sup> Sakr, Taha, *The Persistence of The Death Penalty in Egypt: Why Courts Insist on An Eye for An Eye*, Egypt Independent Newspaper, (2017). Retrieved from; <http://www.egyptindependent.com/death-penalty-egypt/>. see



argument is unsound. Islamic law sources were not used as a source for legislation during the time in which almost all of these criminal codes were enacted.<sup>9</sup> Thus, this argument should not be used as a claim to support the death penalty in the Egyptian law.

## ➤ **EGYPTIAN DEATH PENALTY STATUTES**

There are four different legislations which prescribe the death penalty as a punishment for their crimes: the Egyptian Criminal Law No. 85 of 1937, the Military Rules Law No. 25 of 1966, the Firearms Control Legislation No. 394 of 1954, the Anti-Drug Law No. 182 of 1960, and the new Law No. 95 of 2015 for Confronting Terrorism.

### **A. Egyptian Criminal Law No. 85 of 1937**

The Egyptian criminal law No. 85 of 1937 prescribes the death penalty for almost two dozen different crimes.<sup>10</sup> The first category of such crimes is related to the internal security of the state. This includes crimes such as forming illegal groups whose aim is to abolish the constitution or regulations, prevent governmental institutions from practicing their work, or use terrorist tools to harm national unity and peaceful society. It is also a capital crime to force others to participate in these illegal groups or to continue working with them. Other crimes that fall under this law include the crime of collecting counterintelligence to engage in terrorist work against the country; founding or being the leader of a militant group, whose goal is to overthrow the regime; attempting to occupy public property through the use of power, leading a military unit, airplane, or ship without getting official permission; and being a leader of an armed group with the purpose of expropriating the property of others.<sup>11</sup>

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also; Penal Reform International, *Abolition of The Death Penalty in The Arab World: Effective Strategies and Available Mechanisms*, (March 2012). Retrieved from; <https://cdn.penalreform.org/wp-content/uploads/2013/05/MENA-DP-Toolkit.pdf>.

<sup>9</sup> AL Awa, *supra* note 5.

<sup>10</sup> Criminal Code of Egypt (*Qanun al-Ugubat*) [Egy CrimC], Law No. 85 of 1937.

<sup>11</sup> Egy CrimC, articles. 86, 86a, 86b, 86c, 87, 90, 91 and 93.

The second category of capital crimes under Egyptian criminal law No. 85 of 1937 is related to the external security of the state. Examples of crimes that fall into this category are breaching the sovereignty, independence, unity and peace of the state; joining the enemy's military, collecting counterintelligence against the state in favor of a foreign country; violently shaking the military's morale; urging the soldiers to serve the enemy; destroying or disabling defense weapons; breaching the secrecy of the state's defense by disclosing it to a foreign country; intentionally breaching a supply contract that provides goods and services to the military; and agreeing to commit a crime against the state.<sup>12</sup>

Lastly, the third category of crimes which shall be punished by the death penalty under Egyptian criminal law is murder crimes. These include such crimes as premeditated murder; murder by poisoning; and intentional murder that is associated with a felony or a misdemeanor. Other crimes that fall under this category include committing intentional arson that leads to death; kidnapping and raping girls; and perjury that leads to death.<sup>13</sup>

### **B. Anti-Drug Law No. 182 of 1960**

The Anti-Drug Law No. 182 of 1960 prescribes the death penalty for several different drug-related crimes.<sup>14</sup> Examples include the crime of importing and exporting drug materials; producing and extracting drug materials; culturing the drug; possessing the drug for trafficking purposes; and possessing or managing a place for drug addicts. It is important to note that none of the crimes listed under this act, for which the death penalty is prescribed as a punishment, necessarily result in the death of a person.<sup>15</sup>

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<sup>12</sup> Egy CrimC, articles. 77, 78, 80, 81 and 82.

<sup>13</sup> Egy CrimC, articles. 230, 33, 234, 257, 290 and 294.

<sup>14</sup> Law no. 182, 1960 on Anti-Drug, (*Mukafahti Al Mukhadarat*).

<sup>15</sup> Egy Anti-DrugL, articles, 33a, 33b, 33c, 34, 34c.

### **C. Military Rules Law No. 25 of 1966**

The Military Rules Law No. 25 of 1966 prescribes the death penalty for fourteen crimes, which represents one-third of the entire military code.<sup>16</sup> One example of a capital crime under this law is the crime of not reporting a crime listed in the first chapter of the military code, if one has knowledge that such a crime has occurred. Other examples of crimes under this law include sedition and disobedience; violation of the duties of military service; looting; robbery; destruction of property; abusive use of power or authority; disobedience of commands; and abandonment of military service.<sup>17</sup> Similar to the crimes under the Anti-Drug Law, none of the crimes listed under this act necessarily result in the death of a person. There is also a particular issue with enforcing this military legislation – most of these crimes include general or vague words that are difficult to interpret – such as disobedience, absence, abusive use of power, and sedition.

### **D. Firearms Control Legislation No. 394 of 1954**

The Firearms Control Legislation No. 394 of 1954 did not prescribe the death penalty at the time it was originally codified.<sup>18</sup> However, the law was amended in 1981, under the law No. 15 of 1981, to prescribe the death penalty for one crime. Article 26 of the Firearm Control Legislation states, “The person who possesses weapons, ammunition, or explosives for use in any activity that violates public order or with the intention of violating the system of government or the principles of the Constitution or the statutes of the social body or national unity or social peace shall be punished by the death penalty.”<sup>19</sup> Once again, it is important to reiterate that none of the behaviors listed under this act, for which the death penalty is prescribed as a punishment, necessarily results in the death of a person.

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<sup>16</sup> Law no. 25, 1966 on military rules, (Al Ahkam Al ‘Askariya).

<sup>17</sup> Egy Military Rules, articles, 132, 138, 139, 140, 141, 48, 151 and 154.

<sup>18</sup> Law no. 394 of 1954 on Firearms Control (Al Asleha Walzakhaer).

<sup>19</sup> Egy Firearms Con., art2, of Law no. 394 of 1954 (amend. 1981).

### **E. Confronting Terrorism Law No. 95 of 2017**

Although Egyptian criminal law already contained different articles that dealt with terrorism issues, the current political crisis led the government to insist on creating a separate act to confront terrorism, called the Confronting Terrorism Law No. 95 of 2015.<sup>20</sup> This law was criticized by several national and international human rights organizations for many of the legal problems contained within. In addition to the various articles that prescribe the death penalty for many of the crimes listed therein, the Confronting Terrorism Law also maintains the overbroad definition of terrorism in Egypt's penal code.<sup>21</sup> Article 2 of the law provides, "[A] terrorist act encompasses any use of force or violence or threat or terrorizing that aims to: Disrupt general order or endanger the safety, interests or security of society; harm individual liberties or rights; harm national unity, peace, security, the environment or buildings or property; prevent or hinder public authorities, judicial bodies, government facilities, and others from carrying out all or part of their work and activity."<sup>22</sup> This definition is not compatible with the definition of terrorism that the United Nations Security Council adopted in 2004, and that the UN Special Rapporteur on Counterterrorism and Human Rights subsequently endorsed.<sup>23</sup>

Additionally, the law prescribes the death penalty for several crimes – including for example, the crimes of founding, regulating, managing, or being a leader of a terrorist group; financing terrorist groups; and collecting counterintelligence with the purpose of committing terrorist attacks.<sup>24</sup>

In conclusion, Egyptian legislation prescribes the death penalty in various laws, and prescribes the death penalty for several crimes – which may be estimated to be more than one hundred crimes in

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<sup>20</sup> Law no. 95 of 2015 on Confronting Terrorism (Mukafahti Al Irhab).

<sup>21</sup> Human Rights Watch, Egypt: Counterterrorism Law Erodes Basic Rights, August 2015. Retrieved from; <https://www.hrw.org/news/2015/08/19/egypt-counterterrorism-law-erodes-basic-rights>.

<sup>22</sup> Egy Confront Terrorism law, article 2.

<sup>23</sup> HRW, *supra* note 22.

<sup>24</sup> Egy Confront Terrorism law, articles, 12, 13 and 14.

total. In addition to these crimes, Egyptian codes contain many overbroad definitions for different crimes, leading to different interpretations and definitions. Additionally, the laws prescribe the death penalty for many crimes even though they do not lead to death, such as drug trafficking; terrorism financing; weapons trafficking; possession of a weapon; abusive use of power; and military disobedience. Lastly, it seems from several of these laws and articles that the main purpose of the death penalty is to achieve political aims,<sup>25</sup> rather than to achieve the legitimate criminal justice purposes of the death penalty.

### ➤ **CRIMINAL PROCEDURES AND THE DEATH PENALTY.**

The Egyptian Criminal Procedural Law no. 150 of 1950 sets forth some procedural rules for the death penalty.<sup>26</sup> ***First***, a unanimous consensus between the judges of the court is required to sentence anyone to the death penalty.<sup>27</sup> Military courts are also obliged to follow the same procedural rule.<sup>28</sup> The general rule of judicial decision making is that a majority of the justices must agree; but for the death penalty, a unanimous consensus is mandatory. The Court of Cassation decided that “Art. 381, which states the obligation of the court members’ unanimous consensus, indicates that the legislature made an obligation upon the court to decide the death penalty within the agreement of all of the members, to maintain the legal guarantees of the death penalty imposing due to its nature, contrary to other punishments which require only the majority opinion of the court members.”<sup>29</sup>

***The second procedural rule*** is the obligation to get the opinion of the Egyptian religious clerk before the final decision of the court may be issued. Article 381 states, “The court is obliged to send the

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<sup>25</sup> HRW, *supra* note 22. See also, Karimunda, Aimé Muyoboke, *The Death Penalty in Africa: The Path Towards Abolition*, Farnham, Surrey, England, Ashgate, 2014.

<sup>26</sup> Code of Criminal Procedure: Qanun Al-Ijraat Al Jinaiyah (Egy CrimPC), law no. 150 of 1950.

<sup>27</sup> Egy CrimPC art. 381, law No 150 of 1950.

<sup>28</sup> Egy Military Rules, art. 80.

<sup>29</sup> Appeal no. 63, of April. 1, 1991, Court of Cassation, Criminal Division (Mahkamat al-Naqd Majmuat al-Ahkam al-Sadirah mina al-Hayat al-Ammah lil-mawad al-Jinaiyah) [Egyptian Judicial review], Year, 42, p. 557.

decision of death penalty to the Egyptian religious clerk before the final decision. In cases where the clerk does not respond within ten days, the court has the right to decide the final judgement.”<sup>30</sup> The Court of Cassation has stated that “the legislature aims, through this condition, to confirm the conformity of the court decision to the Islamic law rules; namely, the purpose is related to the religious side, not the legal side. The role of the religious clerk is to decide religiously, not legally.”<sup>31</sup> Furthermore, the court stated that “in addition to the previous purpose, the opinion of the religious clerk gives the criminal the internal feeling of tranquility that his punishment is consistent with the beliefs of religion. Additionally, the opinion of the religious clerk has a big consideration toward the public opinion.”<sup>32</sup>

It is important to note that although the rule of getting the religious clerk’s opinion is obligatory, his opinion is not binding on the court. Namely, the clerk’s opinion is of a consultant nature, not an obligatory one. Even if the clerk responds with an opinion contrary to the court’s decision, the court is not obliged to follow the clerk’s decision. Moreover, if the clerk does not respond to the court within ten days, the court has the right to decide the final judgement of the death penalty. The Court of Cassation has stated, “Article 381 enforces the court to get the clerk’s opinion without obligation to follow his decision.”<sup>33</sup> However, if the court decides the final death penalty judgement without first getting the religious clerk’s opinion, the court’s decision shall be void.<sup>34</sup>

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<sup>30</sup> Egy CrimPC, art. 381, Par. 2.

<sup>31</sup> Bahnam, Ramses, *Al Nathariya Al ‘Aama Lil Qanun Al Jinaei* (English; *The General Theory of The Criminal Law*), Dar Al Nashir, (Cairo, 1997).

<sup>32</sup> Tharwat, Galal, *Nuzum Al Qism Al ‘Aam Fi Qanun Al Uqubat* (English; *The General Section’s regulations of the Penalties law*), Dar Al Matbu’aat Al Jamieiya, (Cairo, 2012).

<sup>33</sup> Appeal no. 263, of Oct. 28, 1981, Court of Cassation, Criminal Division (Mahkamat al-Naqd Majmuat al-Ahkam al-Sadirah mina al-Hayat al-Ammah lil-mawad al-Jinaiyah) [Egyptian Judicial review], Year 32, p. 775.

<sup>34</sup> Revocation of the session of 26 January 1942, Court of Cassation, Criminal Division (Mahkamat al-Naqd Majmuat al-Ahkam al-Sadirah mina al-Hayat al-Ammah lil-mawad al-Jinaiyah) [Egyptian Judicial review], C5, p. 607.

Although Egyptian criminal law states that the religious clerk's opinion is an obligatory procedural rule to decide the final judgement of the death penalty, military law does not have the same condition. Namely, military courts are not obliged to get the opinion of the Egyptian religious clerk.

***The third procedural rule*** is the obligation of the public prosecution department to appeal the criminal court's decision to invoke the death penalty before the Court of Cassation. All death sentences must be referred to the Court of Cassation by the Office of the Attorney General, even if the condemned person refuses to appeal.<sup>35</sup> The Attorney General must submit a memorandum explaining the justification for the sentence to the Court of Cassation. However, appeals are limited, and can only concern points of law. The Appeals Court does not have the right to rule on issues of fact. Death sentences can be appealed before the Appeals Court on three grounds: (1) where the verdict is based on a violation, misapplication, or misinterpretation of the law; (2) where the verdict is legally invalid; and (3) where procedural irregularities had an impact on the verdict.<sup>36</sup> It is worth mentioning that the death penalty decisions of the Supreme State Security Courts cannot be appealed, and once the president has signed the decision of these special courts, it shall be irrevocable.<sup>37</sup>

***The fourth procedural rule*** is to send the court's death penalty decision to the Egyptian President for his ratification. Article 470 states, "The irrevocable decision of death penalty shall be sent, through the Ministry of Justice, to be ratified by the Egyptian President."<sup>38</sup> The same article adds, "The President has the right either to ratify the death penalty decision, or to use his right of clemency; if the President does not respond within 14 days, the death penalty shall be executed."<sup>39</sup> Although some law scholars claim that this procedural rule aims to decrease the imposition of the death penalty by giving

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<sup>35</sup> Egy CrimPC, art. 46 of Law no. 57 of 1959.

<sup>36</sup> Egy CrimPC, art. 30 of law no. 57 of 1959, as amend. by Law 106 of 1962.

<sup>37</sup> Egyptian Emergency Law, Art. 12, law no. 162 of 1958 on Emergency (Qanun Al Tawariea).

<sup>38</sup> Egy CrimPC, art. 470.

<sup>39</sup> *Id.*

the right to the President to use his clemency power to replace the death penalty with another punishment, this right has not to date been used by any President.

In addition to all of the aforementioned procedural rules, the Egyptian Criminal Procedural Law states a number of other rules for the imposition of the death penalty, such as the right of the convicted person to practice his religious rituals before the execution;<sup>40</sup> the convict's right to be visited by his family;<sup>41</sup> the right to have the execution be in closed prisons away from the public;<sup>42</sup> the right of the convicted person to hear the court decision before the execution;<sup>43</sup> the right to have an attorney who is appointed by the court in cases where the convicted party cannot obtain counsel; the right of a pregnant woman to avoid execution;<sup>44</sup> the right to avoid execution during the holiday times;<sup>45</sup> and, lastly, a provision stating that the method of execution shall be by hanging.<sup>46</sup>

### ➤ **THE COURTS AND THE DEATH PENALTY.**

According to Egyptian legislation, there are three main courts that have the right to hear and decide cases where the death penalty is being sought: Felony courts, Military courts and Supreme State Security Courts.

#### **A. Felony Courts**

Article 366 of the Egyptian Criminal Procedural Law states that “the board of the Felony courts is formed of three judges who have the right to decide the penalties and hear the crimes which are stated

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<sup>40</sup> Egy CrimPC, art. 472.

<sup>41</sup> Egy CrimPC, art. 59.

<sup>42</sup> Egy CrimPC, art. 473.

<sup>43</sup> Egy CrimPC, art. 274.

<sup>44</sup> Egy CrimPC, art. 47.

<sup>45</sup> Egy CrimPC, art. 475.

<sup>46</sup> Egy CrimC art. 12.



in the first, second, third and fourth chapters of the Egyptian Criminal Law.”<sup>47</sup> The judges of the Felony courts are appointed by the general assembly of the appeals courts each year.<sup>48</sup>

Regarding the appeal methods before the Felony courts, Egyptian legislation distinguishes between the appeal of a normal judgment and a judgment in absentia. The judgment in absentia is directly appealed by the presence of the convicted person. In other words, the mere presence of the convict nullifies the judgement.<sup>49</sup> The normal, in-presence judgment is appealed through the Cassation Court.<sup>50</sup> It is important to note that the role of the Cassation Court is to resolve questions of law, not questions of fact; it is a court of law, not a court of facts.<sup>51</sup> The Cassation Court states, in clarifying its role, that the role of the Cassation Court is to confirm the validity and the compatibility of the court’s decision with the applicable law without looking at the facts of the case.<sup>52</sup>

## **B. Military Courts**

Military courts consist of three military justices who are headed by the senior military justice of each court. Each military justice should be at least a lieutenant colonel. In addition to the three military justices, Military courts have a representative from the military prosecution department. Furthermore, military seniority is a consideration in the process of choosing the Military courts’ members; namely, the members of the military bench must be senior and have had a long period of service, at least longer than that of the convicted person.<sup>53</sup>

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<sup>47</sup> Egy CrimPC, art. 366.

<sup>48</sup> Egy CrimPC, art. 367.

<sup>49</sup> Egy CrimPC, art. 395.

<sup>50</sup> Egy CrimPC, art. 30.

<sup>51</sup> Surur, Ahmed Fathi, *Usul Qanun Al-ijraat Al-Jinaiyah*, (English; *The Procedural Criminal Law Principles*), Dar Al-Nahda Al-Arabiya, (Cairo 1969).

<sup>52</sup> See, The International Federation of Human Rights, The death penalty in Egypt, April 2005. Retrieved from; <https://www.fidh.org/IMG/pdf/eg415a.pdf>.

<sup>53</sup> Egy Military Rules, art. 50.

Military courts have standing to hear cases that involve military members and crimes that are stated in Law no. 25 of 1966.<sup>54</sup> Lastly, the process of choosing the military justices is through a decision that is drafted by the administrator of the military justice department and ratified by the Vice Supreme Leader of the Egyptian military.<sup>55</sup>

No appeals were possible under the original Military Rules Law; all judgments that were decided by a military court were irrevocable. Then, Law no. 16 of 2007 added an amendment that created a new Supreme Military Court for appeals of military judgments. Article 43 of the law states, “The Supreme Court of the Military Appeals, which is headed by the military judicial department leader, and formed of five military justices, has the competence of hearing the military appeals of the Military courts within all the crimes which are committed by the military or civilian people.”<sup>56</sup>

It is worth mentioning that the Egyptian Military courts have tried at least 7,420 Egyptian civilians during the last three years.<sup>57</sup> Included among those tremendous numbers were 86 children, professors, activists, and students. In May 2016, six people were hanged after a death penalty judgement by the Military court for crimes that were committed during their imprisonment. Additionally, since 2013, there have been more than 60 civilians who have been sentenced to death by the Military courts.<sup>58</sup>

### **C. Supreme State Security Courts**

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<sup>54</sup> Egy Military Rules, art. 72.

<sup>55</sup> Egy Military Rules, art. 69.

<sup>56</sup> Egy Military Rules, amend. no 16 of 2007.

<sup>57</sup> Human Rights Watch, *Egypt: 7,400 Civilians Tried in Military Courts; Torture, Disappearances Used to Elicit Confessions*, April 2016. Retrieved from; <https://www.hrw.org/news/2016/04/13/egypt-7400-civilians-tried-military-courts>.

<sup>58</sup> See, Human Rights Watch, *Cancel Military Court Death Sentences; Convicted Civilians Alleged Torture, Forcible Disappearances*, June 2017. Retrieved from; <https://www.hrw.org/news/2017/06/11/egypt-cancel-military-court-death-sentences>.

The Supreme State Security Courts<sup>59</sup> also have the right to hear and decide death penalty cases. Emergency Law No. 162 of 1958 sets forth the regulations governing and the methods of forming these special courts, as well as the power of the President to intervene to form one of these courts himself. Art. 7 states: “The Supreme State Security Courts have the competence over the crimes committed in violation of the provisions of the orders issued by the Egyptian President; each of the Supreme State Security court shall be composed of three justices. The Egyptian President may form two kinds of state security courts; first, the Partial State Security court, which is formed of one or two of the military justices. Second, Supreme State Security court, which is formed of three or two of the military justices.”<sup>60</sup> Article 8 of the Emergency Law states: “The President may, in areas subject to a special judicial system or in certain cases, form a State Security Court which is held by police officers; this court shall apply the procedures prescribed by the President. Furthermore, one of the police officers will do the job of the public prosecution.”<sup>61</sup> Additionally, the same law gives the President the right to send cases involving crimes that are punishable under Egyptian criminal law to one of these special courts to hear and decide the applicable punishment. Lastly, there is no possible appeal of decisions made by these special courts, and the ratification of the President makes it irrevocable.<sup>62</sup> The Emergency Law, Article 12 of Law No. 162 of 1958, states: “No one shall appeal the judgments of the Supreme State Security Courts, and these judgements are irrevocable by the ratification of the President who has the right to cancel, mitigate, or replace it with another punishment.”<sup>63</sup>

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<sup>59</sup> Surur, supra note 52. See also, Brown, Nathan, *A Guide Through the Egyptian Maze of Justice*, Carnegie Endowment for International Peace, June 2012. Retrieved from; <http://carnegieendowment.org/2012/06/06/guide-through-egyptian-maze-of-justice-pub-48302>.

<sup>60</sup> Egyptian Emergency Law no. 162 of 1958 (Egy EmerLaw).

<sup>61</sup> Egy EmerLaw, art. 7.

<sup>62</sup> Egy EmerLaw, articles 7, 12 and 11. See also, International Commission of Jurists, *Egypt's new Constitution: A flawed process; uncertain outcomes*, p. 36-44, November 2012. Retrieved from; <https://www.icj.org/wp-content/uploads/2012/11/EGYPT-CONSTITUTION-REPORT-w-COVER.pdf>.

<sup>63</sup> *Id.*

## ➤ **INELIGIBILITY FOR THE DEATH PENALTY.**

Egyptian legislation provides for two main cases where the death penalty may not be imposed, resulting in legal ineligibility: psychogenic disorder and infancy.

### **A. Psychogenic Disorder**

Egyptian criminal law was amended by the Law No. 71 of 2009 to add new rules related to psychogenic disorder. The previous Egyptian criminal law declared there would not be criminal liability in cases involving “the absence of will during the time of committing the crime, either by insanity, by mental disorder, or by unconsciousness which results from taking addictive drugs either unwillingly or by force.”<sup>64</sup> The new 2009 amendment also states, “The absence of will during the time of committing the crime, either by insanity, by mental disorder, or by unconsciousness which results from taking addictive drugs either unwillingly or by force.”<sup>65</sup> But the same amendment adds: “The criminal shall be responsible in a case where this psychological or mental disorder affects his will by decreasing it, but the court shall take into consideration this effect upon the will in deciding the deserved punishment.”<sup>66</sup> In other words, the new amendment has distinguished between the total absence of will and the partially affected will. The legal consequence of complete non-liability is the non-punishment of the criminal;<sup>67</sup> namely, the investigation shall be terminated, and the court shall decide the innocence of the criminal due to the absence of the criminal’s will. However, this legal consequence of non-punishment is restricted to the unintentional absence of will. If the criminal intentionally led himself to the absence of

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<sup>64</sup> Egy CrimC, art. 62.

<sup>65</sup> Egy CrimC, art. 62, amend law no. 71 of 2009.

<sup>66</sup> *Id.*

<sup>67</sup> *Ibid, supra* note 1, at 546.

will, he shall be responsible for the consequence of this intentional absence of will. An example is the case of a person intentionally getting addicted to drugs or intentionally getting drunk.

On the other side, Article 339 of the Egyptian Criminal Procedural Law governs the absence of will that occurs after committing the crime and during the investigations. This article states: "If the accused is unable to defend himself due to a mental disorder that occurred after committing the crime, the case or trial shall be suspended until he returns to his senses. If a mental disorder happens after the completion of the preliminary investigation and before the adjournment of the case, the next procedures shall not be taken."<sup>68</sup>

## **B. Infancy**

The Children's Law No. 12 of 1996 provides that children who are under the age of twelve at the time of committing the crime may not be held criminally liable; however, children who are between the ages of seven and twelve who commit a crime shall be subject to a special court called Children's Courts.<sup>69</sup> The Children's Law declares that the Children's Court shall have exclusive jurisdiction over these types of cases. Furthermore, it sets forth the procedural rules that must be followed with those children who are between seven and twelve years old. It is worth mentioning that the Children's Law forbids both death penalties and life sentences for children, and instead replaces them with other punishments.<sup>70</sup>

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<sup>68</sup> Egy CrimPC, art. 399.

<sup>69</sup> Egy law, art. 94, law no. 12 of 1996 on children regulation, (*Qanun Al Tifl*).

<sup>70</sup> Egy Children law, art. 101.

## ➤ **MITIGATION, COMMUTATION, AND LAPSE OF THE DEATH PENALTY**

Egyptian legislation provides two cases for the lapse or mitigation of the death penalty, either by statute of limitations or by Presidential clemency. These are two cases in which the state has no right to execute the offender.

### **A. Lapse of the Death Penalty by the Statute of Limitations**

One of the main philosophies of Egyptian criminal legislation is to achieve social rehabilitation and discipline the offender. The lapse of time negates the main philosophy of social rehabilitation, so to compensate for this, Egyptian legislation sets forth the statute of limitations in these situations.<sup>71</sup>

Article 528 of Egyptian criminal procedure states that “the statute of limitations for the death penalty is 30 years.”<sup>72</sup> The statute of limitations begins running once the judgement becomes irrevocable.<sup>73</sup> In other words, once the death penalty judgement is appealed in the Cassation Court, it becomes irrevocable, and therefore, the statute of limitations begins to run.<sup>74</sup> Additionally, the law does not allow the offender whose penalty was lapsed to stay at the place where the crime was committed; if he remains, he will be sentenced to prison.<sup>75</sup>

### **B. Lapse of the Death Penalty by Presidential Clemency**

Clemency means the non-execution or mitigation of the death penalty, to be replaced with another punishment such as life imprisonment.<sup>76</sup> It is a decision that is decided and ratified by the

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<sup>71</sup> *Ibid, supra* note 1, at 736. See also, Salama, Mamun Muhammad, *Al-ijraat Al-Jinaiyah Fi Al-tashrī' Al-miṣrī* (English; The Criminal Procedures in The Egyptian Legislation), p. 644, Dār al-Fikr al-Arabi, (Cairo 1976).

<sup>72</sup> *Egy CrimPC*, art. 528.

<sup>73</sup> *Egy CrimPC*, art 529.

<sup>74</sup> Surur, *supra* note 51, at 239.

<sup>75</sup> *Egy CrimPC*, art. 533.

<sup>76</sup> Penal Law Reform, *supra* note 9. See also, Surur, *supra* note 51, at 649. *Ibid, supra* note 71.

President, either to cancel the death sentence or to replace it with life imprisonment.<sup>77</sup> The President has the right to extend clemency even after the death penalty judgement becomes irrevocable.<sup>78</sup>

### ➤ **GENERAL COMMENTS ON THE DEATH PENALTY IN EGYPT**

**First**, the history of the Egyptian legal system and criminal law codification over the last two centuries was neither connected to nor affected by Islamic law.<sup>79</sup> The main source for the first criminal code in the 18<sup>th</sup> century was the French legal system. Additionally, the amendments to the Egyptian criminal code during the 19<sup>th</sup> century also were not based on Islamic law. Moreover, the processes of criminalizing and punishing under the Egyptian law were not based on the Islamic philosophies of punishment. Consequently, the arguments for retaining the death penalty within Egyptian criminal law in the name of Islamic religious tradition simply do not align with the history of the codification of Egyptian criminal law.

**Second**, Islamic law did not play any role in the process of forming the death penalty in Egyptian legislation. More specifically, the criteria for determining the acts that should be punished by the death penalty are not based on Islamic law. This is evidenced by the fact that Egyptian criminal law prescribes the death penalty for crimes that did not merit the death penalty under Islamic law, and also wholly ignores acts that are criminalized under Islamic law. Thus, since the death penalty in Egypt is not based on Islamic law sources, the claim that Sharia law has had an effect on Egypt's version of the death penalty is unfounded.<sup>80</sup>

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<sup>77</sup> Egy CrimC, art. 75.

<sup>78</sup> *Ibid*, *supra* note 1, at 732.

<sup>79</sup> See, AL Awa, Anderson and Al Jindi, *supra* note 5.

<sup>80</sup> Wood, Leonard G. H, *Islamic Legal Revival: Reception of European Law and Transformations in Islamic Legal Thought in Egypt, 1875-1952*, Oxford University Press, (Oxford 2016). See also, Peters, Rudolph, *Crime and Punishment in Islamic Law—Theory and Practice from the Sixteenth to the Twenty-First Century*, 38-52, (Cambridge, 2005). Wasti, Tahir, *The Application of Islamic Criminal Law in Pakistan: Sharia in Practice*, Leiden: Brill, 2009. Abu Talib, Sufi Hassan, *Tatbieq Al Shariea Al Islamiyah Fi Al Bilad Al Arabiya* (English; *The Application of Islamic Law in The Arabic Countries*), p. 5-15, Dar Al Nahda Al Arabiya, (Cairo 1977). Al Jindi, Abdul Halim, *Tatwier*

**Third**, Egyptian legislation prescribes the death penalty for several crimes that are not classified as serious under Article 6(2) of the ICCPR.<sup>81</sup> For example, Egyptian law provides that the death penalty may be imposed for possession of a weapon, drug trafficking, drug culturing, financing terrorism, and political crimes. Furthermore, the text of the laws that prescribe the death penalty includes provisions that are too general and defective to be used in such a life-and-death situation. For example, the Confronting Terrorism Law of 2015 contains numerous words that have general and varied meanings, without providing a definition section to further clarify those terms. Examples include words such as “security state,” “terrorism,” “sedition,” and “abusive use of power.”

**Fourth**, legal scholars – including legislators, lawyers, and judges – who are proponents of the death penalty are overly confident in the criminal procedure rules governing the death penalty, as if those rules are real guarantees for achieving justice. All of the procedural rules governing the death penalty mentioned in Egyptian laws are simply the same basic rules found in any legal system, and certainly do not merit all of this confidence. Additionally, the procedural rules that require getting the religious clerk’s opinion<sup>82</sup> after a death penalty decision are defective and not appropriate for a normal legal system. The argument made in favor of the rule is that it gives the offender the feeling of compatibility with his faith; however, this assumes that the offender is Muslim. Why should a non-Muslim offender wait for a decision from the supreme Muslim clerk of Egypt to confirm that the death sentence is compatible with Islam? In short, the defective substantive rules governing the Egyptian death penalty that render the procedural rules essentially futile should not be touted by legal scholars as safeguards against unfair death penalty practices.

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*Al Tashrie’at Wefqn Lilmithaq Wal Dustor*, (English; *The Development of The Legislations According to The Charter and The Constitution*), Al Dar Al Qawmiya for Press and Publishing, (Cairo, 1965).

<sup>81</sup> International Covenant on Civil and Political Rights, *Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI)*, December 16, 1966, entry into force, March, 23, 1976, in accordance with Article 49. Retrieved from; <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>.

<sup>82</sup> Egy CrimPC, art. 381, Par. 2.



**Fifth**, the Military courts have broad jurisdiction over both military and civilian people for many crimes that do not lead to death.<sup>83</sup> Egyptian legislation must work to limit the power of the Military courts to exercise jurisdiction only over military people. Additionally, all of the crimes that lead to the imposition of the death penalty must be replaced with other punishments. There is a lack of neutrality in the military justice of these courts that would be unacceptable in a respectable legal system in our contemporary world. This lack of neutrality is evidenced by the Military court's jurisdiction over civilians, the several general crimes of the death penalty under the Military Rules Law, and the fact that the judges of the Military courts are appointed by the military administration. In short, the entire legal system of the Military courts must be changed and replaced with a better legal system that aims to maintain criminal justice for both military and civilian people.

**Sixth**, the State Security Special Courts are one of the main obstacles that hinders criminal justice as it relates to the imposition of the death penalty in the Egyptian legal system. Giving the President the unlimited powers of forming these special courts, appointing their members, choosing the members from the police and military officers, and making irrevocable judicial death penalty judgements represent huge barriers to achieving the goals of respect for human rights, criminal justice, and death penalty reform in Egypt.

**Finally**, although the Pharaonic legal system, which is one of the very ancient legal systems, has been applied in Egypt for thousands of years, historians report<sup>84</sup> that the application of death penalty during the Pharaonic era was more fair and just than under the current legal system in Egypt. Furthermore, when Islamic law was the main source of Egyptian legislation, the application of the death

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<sup>83</sup> HRW, *supra* note 58.

<sup>84</sup> Zanati, *supra* note 2. See also, Loon, Van. A.J. Law and Order in Ancient Egypt; The Development of Criminal Justice from The Pharaonic New Kingdom Until the Roman Dominate, Leiden University, December 2014. Retrieved from; <https://openaccess.leidenuniv.nl/bitstream/handle/1887/30196/Law%20and%20Order%20in%20Ancient%20Egypt.pdf?sequence=1>.

penalty was more limited to specific crimes and was not overused like it is today, under the current situation that prevails within the Egyptian legal system.

## Chapter Two:

# Islamic Law and the Death Penalty

## 1 PREFACE

Before discussing the death penalty in Islamic law, it would be helpful to introduce terms, issues and ideas, and structures and sources of Islamic criminal law. This preface introduces and explains some terms and background information that will provide necessary context to the reader in order to better understand.

### A. The Sources of Islamic Law

There are two main sources of Islamic law: (1) Shariae – the primary source, and (2) Fiqh – the supplementary source. Shariae, in turn, draws upon the two main sources of Islam: the Quran and the Sunnah. The Quran is known as the primary source of Islam because it is the words of God.<sup>1</sup> Sunnah refers to the words and actions of the prophet Mohamed.<sup>2</sup> Fiqh, or Islamic jurisprudence, is represented by the legal rulings that Muslim scholars have made based on Shariae.<sup>3</sup> The process of understanding the primary sources, the Quran and the Sunnah, leads to founding these supplementary sources through the developments of Islamic law after the death of the prophet and the discontinuing of the revelation from the God “Quran” and his prophet “Sunnah.”<sup>4</sup> These supplementary sources vary according to different schools of thought and the respective methodology of each school. Examples of these supplementary sources are Ijmaa (consensus of Islamic law scholars and judges), Qiyas (Analogy), Urf (custom), Maslaha (considering of the public good), and Istihsan (reasoning based on the best outcome or equity).<sup>5</sup>

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<sup>1</sup> William A. Schabas, *Symposium, Islam and the Death Penalty*, 9 WM. & MARY BILL OF RTS. J. 223, 231 (2000).

<sup>2</sup> Bassiouni, Cherif, *The Shariae and Islamic Criminal Justice in Time of War and Peace*, 59-64, (Cambridge, 2014).

<sup>3</sup> Elizabeth Peiffer, *The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria*, 11 Wm. & Mary J. Women & L. 507 (2005).

<sup>4</sup> Bassiouni, *supra* note 2, 18-88.

<sup>5</sup> Housni, Mahmoud Naguib, *Madkhal Li Ifiqh Al Jinaei Al Islami*, (English, *An Introduction to The Islamic Criminal Jurisprudence*), 68-119 Dar Al Nahda Al Arabia, (Cairo, 191984).

## B. Crime and Punishment Categories in Islamic Law

Islamic law divides punishments and crimes into three main categories: (1) Hudud, (2) Qisas, and (3) Ta'zirat. The classifications of the crimes or the punishments are based on different rules and principles, such as God's rights, individual's rights, and society's rights. They are also based on the seriousness and severity of the crime as well as the methods which are used to incriminate and penalize a person.

### *i. Hudud*

Hudud are the punishments and crimes<sup>6</sup> that have been prescribed by God in the revealed text of the Quran and the Sunnah,<sup>7</sup> the application of which is the right of God. The Hudud crimes are the most serious crimes that are of relevant interest to the whole community. Imposing penalties on the offenders of those crimes is mandatory on the whole community which is represented by the legitimate authority.<sup>8</sup> Additionally, Hudud punishments must be executed as they are prescribed in the Quran and Sunnah without increasing, decreasing, probating, or suspending.<sup>9</sup>

The Quran and the Sunnah, the main and only sources of Hudud in Islamic law, state specific crimes that are related to the community's interest.<sup>10</sup> For example, the crimes which are prescribed for Hudud are theft, consumption of alcohol, armed robbery, illicit sexual relations, slanderous accusation of non-chastity, and armed rebellion. In addition, the primary Islamic law sources determine the

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<sup>6</sup> In Arabic, the word Hudud is the plural of Hadd which is used, Synonymously, for both the crime and punishment.

<sup>7</sup> Awa, Mohamed Salim El-, *Punishment in Islamic Law. A Comparative Study* (American Trust Publications, Indianapolis, IN, USA, 1982).

<sup>8</sup> Sanad, Nagaty, *The Theory of Crime and Criminal Responsibility in Islamic Law*, 50, (Off. of Int'l Crim. Just. 1991).

<sup>9</sup> Bahnasi, Ahmed Fathei, *Madkhal Al Fiqh Al Jinaei Al Islami* (English: *Introduction to the Islamic Criminal jurisprudence*), 101-151, (Dar Al Shorouk, Cairo, 1989).

<sup>10</sup> Tellenbach, Silvia, *Islamic Criminal Law, The Oxford Handbook of Criminal Law*, Markus D. Dubber and Tatjana Hörnle, Ed. (March 2015).

punishments for the crimes of Hudud as the death penalty, cutting off the hands, banishment, and flogging and stoning to death.<sup>11</sup>

*ii. Qisas*

Qisas, or retaliation, are crimes against persons,<sup>12</sup> and are punished by harming the offender in the same way he offended the victim.<sup>13</sup> Qisas crimes and punishments are in a middle position between Hudud and Ta'zir. Qisas crimes are less severe than the Hudud crimes, which are relevant to the whole community's interest.<sup>14</sup> Additionally, Qisas crimes are the crimes that are committed against bodily integrity, intentionally or unintentionally. The examples of the retaliation crimes are murder, intentional and unintentional killing, and voluntary and involuntary injury.<sup>15</sup>

Qisas punishments are classified into two kinds: material and moral.<sup>16</sup> The material Qisas is a punishment that harms the offender in the same way that he harmed the victim – soul for soul, eye for eye, and hand for hand. The moral Qisas is blood money or money that is paid as an alternative form of punishment by an offender who intentionally assaulted the life or the body of another.<sup>17</sup> Thus, Islamic law scholars consider blood money a punishment of moral retaliation that is imposed in cases where the material punishment is not imposed.<sup>18</sup>

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<sup>11</sup> Since this punishment is not stated in the Quran, so some of the Islamic law scholars don't recognize the penalty as a punishment in the Islamic law. See more, Awa, *supra* note 7. Additionally, Al Qaradawi, Abu Zahra, Al Ghanoshi, Al raisouni, Al Zarqa and others are some of the contemporary Islamic law scholars who don't recognize the stoning to death punishment.

<sup>12</sup> Peiffer, *supra* note 3.

<sup>13</sup> Auda, Abd al-Qadir, *Al-tashri' Al-djina'i Al-islami muqaranan bi'l-qanun Al-wad'i*, (*Islamic Criminal Law comparing to the Secular Law*,) volume 1, 663, (Dar Al Katib Al Arabi, Beirut).

<sup>14</sup> Housni, *supra* Note 5.

<sup>15</sup> *id.*

<sup>16</sup> Abu Zahra, Mohamed, *Al-djarima wal-'uquba fi'l-fiqh al-islami*, (English: *Crime in the Islamic Jurisprudence*), 78, Dar Al Fikr Al Arabi, (Cairo, 1998).

<sup>17</sup> Bahnasi, *Supra* Note 9 at 668.

<sup>18</sup> Auda, *supra* Note 13.

There are major distinctions between Hudud and Qisas. The Hudud relates to the rights of God and the whole community's interest – and the community, which is represented by the legitimate authority, is obliged to prosecute the offenders of these crimes. Namely, the rules of Hudud are considered to be mandatory, and no one has the right to waive the punishments of these crimes. On the other side, Qisas relates to an individual's rights. The rules of Qisas are not considered to be mandatory, as the victim has the right to waive the punishment or request for prosecuting it. Thus, the prosecution of Qisas punishments are mainly dependent upon the will of the victim or his relatives.<sup>19</sup>

### *iii. Ta'zir*

Ta'zir is the last category of punishments and crimes in Islamic jurisprudence. Ta'zir means to chastise or to correct, and is a type of punishment meant to chastise and reform the offender. Islamic law scholars define Ta'zir as "discretionary punishment to be delivered for transgression against God [community's interest], or against an individual for which there is no fixed punishment."<sup>20</sup> Namely, the main purpose of Ta'zir in the Islamic criminal jurisprudence is to give the power to render punishments for crimes that may not be classified as either Qisas or Hudud.<sup>21</sup> An example of a crime of Ta'zir is drinking alcohol, which is prohibited in the Quran but has no prescribed punishment. The authority has the right to render a punishment that is commensurate with the crime and appropriate by societal standards, such as prison time or fines.<sup>22</sup> Because the Ta'zir category does not have a fixed list of prescribed crimes, it allows for the creation of new crimes to account for changing societal values.<sup>23</sup>

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<sup>19</sup> Bahnasi, Ahmed Fathei, *Al Qisas in the Islamic Jurisprudence*, (English: *Retaliation in The Islamic Jurisprudence*), Dar Al Shorouk, (Cairo, 1989).

<sup>20</sup> Sarakhsi, *Mabsut*, Vol. IX, P. 36; Shirbini, *Mughni al Muhtaj*, Vol. 6, P. 44.; Ibn Al Humam *Fath al Qadir*, Vol. IV, P. 211.

<sup>21</sup> Housni, *supra* Note 5 at 97.

<sup>22</sup> *Id.* at 99.

<sup>23</sup> Ibn Taimyia, *Assyiassa Al Shareiya*, 119, 120.

Examples of these type of crimes include crimes against intellectual property and crimes against cybersecurity.

Additionally, the Hudud crimes, such as theft, murder, and armed robbery, require sophisticated and different criminal procedure rules to enforce their punishments of the death penalty and cutting off the hands; however, if these criminal procedural rules or conditions are not fulfilled, the prescribed penalties shall not be executed.<sup>24</sup> Consequently, in these cases, the authority will have the power to execute a less severe punishment than the prescribed penalty, such as imprisonment. Also, if the victim's family waives the right to seek the death penalty, the authority will have the power to prescribe another punishment, less severe than death penalty, as a way of maintaining the authority's right.<sup>25</sup>

The punishments of Ta'zir are any punishments which are not prescribed in the primary sources of Islamic law. Examples of Ta'zir punishments include imprisonment, fines, seizure of the property, public disclosure, as well as any other punishments that are developed or created to account for changes in societal values outside of the prescribed and limited circle of Hudud and Qisas. In conclusion, Ta'zir aims to give discretionary power to the legitimate authority to respond to changes in society by developing the scope of criminal law.

### **C. The Idea of Blood Money (Diya) in Islamic Criminal Law**

Blood money is the punishment that requires the offender to pay the victim or the victim's family in cases involving homicide or injury.<sup>26</sup> Blood money is classified as both a punishment and a compensation, because it is paid as a compensation to the victim due to the murder or the injury, and it is paid as a punishment because it is imposed on the offender as a penalty due to his crime of murder or

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<sup>24</sup> Awa, *supra* note 7, at 181, 182.

<sup>25</sup> Bahnasi, Ahmed Fathei, *Al Jaraim Fi Al Fiqh Al Islami*, (English: *Crimes in the Islamic Jurisprudence*), 246-252, Dar Al Shorouk, (Cairo, 1988).

<sup>26</sup> Bahnasi, Ahmed Fathy, *Al Diya in The Islamic Jurisprudence*, (English: *Blood Money in the Islamic Jurisprudence*), 9-11, Dar Al Shorouk, (Cairo, 1988).



injury.<sup>27</sup> The value of blood money is different depending on the *mens rea* of the crime, i.e., whether it is deliberate, quasi-deliberate, accidental, equivalent to accidental or indirect murder or injury crimes.<sup>28</sup>

Islamic law scholars have stated that if the offender does not have the ability to pay the blood money, his family (the blood relative male) is obliged to pay it for him. Furthermore, they have stated that if the offender or his family does not have the financial ability to pay the blood money, the government is obliged to pay it on the offender's behalf.<sup>29</sup>

Blood money is an exception to principle of personality that Islamic law normally adopts with regards to punishments. This principle states that the penalty must only be against the offender and not against his friends and family. However, Islamic law provides that requiring the offender's relatives or the government (which represents the whole society) to pay blood money is acceptable as a way of saving the life of the offender by avoiding the death penalty.<sup>30</sup> Furthermore, in the past, the idea of the family bearing responsibility for all of its members was pervasive. Additionally, the concept of blood money is mainly based on the philosophy of Islam that individuals should be supportive of their communities and engage in social solidarity while maintaining the values of brotherhood. In addition to the philosophy of social solidarity and minimizing use of the death penalty, Islamic law philosophy aims to save the life of offenders whether they are rich or poor; thus, if the amount of blood money owed is too much to be paid by the poor offender, Islamic law provides that the relatives or the state should step in to help pay, thus avoiding the execution of only poor people.<sup>31</sup>

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<sup>27</sup> Auda, *supra* note 13 at 668.

<sup>28</sup> Abu Zahra, Mohamed, *Al Uquba Fi Al Fiqh Al Islami*, (English: *Punishments in The Islamic Jurisprudence*), 500, Dar Al Fikr Al Arabi, (Cairo, 1998).

<sup>29</sup> *Id.* at 520.

<sup>30</sup> Bahnasi, *supra* note 26 at 15.

<sup>31</sup> Auda, *supra* note 13, 674-677.

Due to the relative absence of the idea of the family in contemporary society and the modern world, compared to the past, Islamic law scholars have stated that the governments must bear the responsibility of paying blood money in cases where the offender has no financial ability to pay it.<sup>32</sup>

It is worth noting that blood money is obligatory on the offender as a general rule. This means that certain legal exceptions do not apply to blood money, such as the statutes of limitation or the fact that the offender may be a minor, incompetent, incapacitated, or insane. Even the death of the offender does not affect the amount of blood money owed. Moreover, if the authorities fail to find the offender, the state is obliged to pay the blood money to the victim's family due to its responsibility to maintain the security and the life of its people. Islamic law adopts an interesting principle<sup>33</sup> that states that there is no wasted blood. This means that for each murder or injury in Islam, each victim who is wounded or killed must be compensated – even if the investigations failed to find the offender. In these cases, the government is obliged to compensate the victim.<sup>34</sup>

## **2. DEATH PENALTY CRIMES IN ISLAMIC LAW;**

As discussed above, Islamic law divides crimes and punishments into three main classifications: Hudud, Qisas, and Ta'zir. The sources of Islamic law, both primary and supplementary, prescribe the death penalty for some crimes of Hudud, Qisas, and Ta'zir. The Quran prescribes the death penalty for armed robbery<sup>35</sup> and armed rebellion which leads to death,<sup>36</sup> and gives the right to the victim's family to choose whether to pursue the death penalty in cases of intentional murder. Consequently, the death penalty is explicitly stated in Islamic law as a punishment for crimes that deliberately lead to death of

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<sup>32</sup> Tellenbach, *supra* note 10, at 13.

<sup>33</sup> Al Sharif, Al Azhar, *The Islamic Constitution Proposal*, Art. 35. See also, Peters, Rudolph, *Murder in Khaybar: Some Thoughts on the Origins of The Qasamah Procedure in Islamic Law*, *Islamic Law and Society*, Volume 9, Issue 2, 132 – 167, 2002.

<sup>34</sup> Bahnasi, *supra* note 26, 170-178.

<sup>35</sup> Awa, *supra* note 7, at 8.

<sup>36</sup> Abu Zahra, *supra* note 16, at 125.

the victim. However, the other supplementary sources contributed to the increase in the number of crimes of the death penalty, due the scholars' differing methodologies of understanding the primary sources of Islamic law – the Quran and the Sunnah. For example, some Islamic law scholars prescribe the death penalty for the crime of apostasy as well as the crime of a married individual having an illicit sexual relationship, but other Islamic law scholars disagree with the application of the death penalty in these contexts. In short, the Islamic law provides for the death penalty, explicitly, for the crimes of armed robbery and armed rebellion which lead to death, and gives the right to the victim's family to decide about the death penalty in the case of intentional murder.

In order to clarify the opinions of Islamic law scholars regarding the death penalty, it is helpful to examine each crime to show the justifications that Islamic law scholars use for their opinions. These examinations will also support the conclusion that the death penalty is prescribed as a punishment only for crimes which lead, directly and deliberately, to death.

### **A. Armed Robbery**

There are three different terms which are used to denote this crime: armed robbery, great theft, and highway robbery.<sup>37</sup> Islamic law scholars have defined this crime as “waiting by the way to steal travelers' property by force, and by this means obstructing travel on this road [which leads to the death of the robbed person].”<sup>38</sup> Armed robbery is one of the Hudud crimes, which means it is related to the rights of God or the whole community's rights. When an armed robbery leads to death, capital punishment must be executed as it is prescribed in the Quran and the Sunnah without increasing, decreasing, probating, or suspending it.<sup>39</sup> Islamic law mandates the death penalty for this crime because it is a crime that is considered as an attack on the security of the whole community and the security of

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<sup>37</sup> Awa, *supra* note 7, at 7.

<sup>38</sup> Mawardi, *Al Ahkam Al Sultanyia*, P. 2.

<sup>39</sup> Bahnasi, *supra* note 9, at 121-124.

the legitimate authority as well. Additionally, this crime is mainly aimed at the militant terrorist groups that assault communities and individuals – threatening their lives, killing them, and stealing their properties. Consequently, the punishment is harsh, but it is appropriate considering the nature of the crime.<sup>40</sup>

Islamic law scholars place some limitations on using the death penalty as a punishment. For example, the offender must be sane, having the legal capacity; must be of age for legal capacity; and must commit a crime that leads to death. Namely, the death penalty shall not be carried out against the insane or against children who have not yet reached the age of legal capacity.<sup>41</sup>

In addition to these conditions, Islamic law states that if the offender renounces the crime before the authority could arrest him, the death penalty shall not be imposed.<sup>42</sup> However, this renunciation will move the crime classification from the category of community's rights to the category of individual's rights. Namely, the offenders will be liable only to the victim for the personal harm that he committed.<sup>43</sup> Therefore, any crime that an offender renounces moves the crime from the Hudud classification to Qisas classification, which leads to the possibility of avoiding the death penalty.

## **B. Armed Rebellion**

Armed rebellion is defined as an armed uprising against the legitimate authority.<sup>44</sup> It is classified as a Hudud crime, which is related to the rights and the interests of the whole nation and community. In order to use the death penalty as a punishment for armed rebellion, Islamic law states three main conditions.<sup>45</sup> First, the offenders must rebel and rise up against the legitimate authority through the use

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<sup>40</sup> Auda, Abd al-Qadir, *Kitab al-tashri' al-djina'i al-islami muqaranan bi'l-qanun al-wad'i*, (English: *Islamic Criminal Law comparing to The Secular Law*), volume 2, 638, Dar Al Katib Al Arabi.

<sup>41</sup> Abu Zahra, *supra* note 28, at 133.

<sup>42</sup> Auda, *supra* note 40, at 659.

<sup>43</sup> Abu Zahra, *supra* note 16, at 77, 282.

<sup>44</sup> Auda, *supra* note 40, at 673.

<sup>45</sup> *Id.* 674-697

of military force and armed power that leads to the death of the people. Second, the offenders must actually be guilty of participating in an armed rebellion; if those offenders have not yet committed the crime, the legitimate power shall not impose the death penalty against them. Third, the offenders must have the criminal intention to rebel against the legitimate authority through the use of military power.<sup>46</sup>

Consequently, if a person rebels against the legitimate power without armed power, or has not yet started their crime, the legitimate authority does not have the right to pursue the death penalty as a punishment. Additionally, if a person engages in peaceful uprisings and non-armed rebellions, the legitimate authority does not have the right to enact penalties against him.<sup>47</sup> Furthermore, after the legitimate authority has successfully quashed an armed rebellion, it may not punish the prisoners of war using the death penalty.<sup>48</sup> Also, since the main motive of this crime is political, and the armed rebellion offenders are trying to change the legitimate regime by using military force, Islamic law obliges the legitimate authority to try to convince those offenders to stop their criminal practices through dialogue before fighting them.

In short, there is no specific punishment for this crime, but Islamic law justifies using the death penalty against those who commit armed rebellion because they use military force against the people or the nation. Besides that, the legitimate power is limited in its use of the death penalty against armed rebels until the fighting ceases, after which the government has no right to claim the death penalty against their POWs.

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<sup>46</sup> Bahnasi, Ahmed Fathei, *Al Masuoliya Al Jina'iya fi Al Fiqh Al Islami*, (English: *The Criminal Responsibility in the Islamic Jurisprudence*), 85, Dar Al Shorouk, (Cairo, 1988.)

<sup>47</sup> Bassiouni, *supra* note 2, at 134.

<sup>48</sup> Bahnasi, *supra* note 9, at 95.

### C. Adultery

Islamic law does not allow sexual relationships outside of a marriage. If an unmarried man has an adulterous affair with a married woman, scholars agree that he shall be flogged 100 lashes.<sup>49</sup> On the other side, Islamic law scholars do not agree whether a married man who engages in an adulterous affair shall be punished by stoning to death or by flogging him 100 lashes like the unmarried person.

The main source of dispute between the Islamic law scholars is due to the lack of distinction between a married and an unmarried person in the Quran, which only prescribes flogging as a general punishment for adultery.<sup>50</sup> Before the inclusion of this specific crime and punishment in the Quran, a married Jewish man came to ask for judgment of his crime of adultery, and the prophet decided that the man should be stoned to death as punishment. Moreover, before the revelation of the Qur'anic rule of flogging, the prophet decided that stoning to death was appropriate in the case of two Muslim people who engaged in adultery. As a result, some scholars of Islamic law state that flogging is proper for both married and unmarried persons based on the idea that the Quranic rule abrogates the previous practices and sayings of the prophet.<sup>51</sup> These scholars also say that the prophet decided on the penalty of stoning to death for both the Jewish man and the Muslim people based on the religious resources available, the Old Testament, which prescribes the death penalty for the crime of adultery.<sup>52</sup> By contrast, other Islamic law scholars state that stoning to death remains the appropriate penalty for adultery based on the practices of the prophet. In the end, most of the prominent contemporary Islamic law scholars agree that stoning to death was abrogated by the flogging punishment that was later included

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<sup>49</sup> Quran, *Surat Al Nour, Light Chapter, 24: 2*.

<sup>50</sup> *Id.*

<sup>51</sup> *Awa, supra note 7, at 15.*

<sup>52</sup> *Id.*

in the Quran, and therefore these scholars conclude that Islamic law does not allow for the death penalty for the crime of adultery.

There are significant hurdles that must be overcome before any punishment may be rendered for this crime, including many sophisticated and complicated procedures that must be followed to prove the crime.<sup>53</sup> For example, there must be at least four competent witnesses to the crime; the adultery must be seen by all of the witnesses while it is being committed; and the adulterer who confesses has the right to withdraw his confession. There are also numerous cases of adultery where women claimed that they were unconscious, or that they were raped, in which cases the judges declined to sanction the women even without investigating the veracity of their claims. Thus, these complicated procedural rules make it difficult to apply either the stoning-to-death penalty or the flogging penalty.

In short, the stoning-to-death penalty is a controversial punishment in Islamic law, leading most of the contemporary Islamic law scholars to prescribe flogging rather than stoning. In addition to these controversies, the required criminal procedural rules make it hard to be applied. Furthermore, the primary source of Islamic law, the Quran, does not prescribe the death penalty as a punishment for adultery, and instead only prescribes flogging for both married and unmarried people. Finally, the preference for the flogging penalty is supported by the fact that a harsh and serious punishment, like stoning to death, cannot be imposed without having approval from the basic source of Islamic law, the Quran.

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<sup>53</sup> Bahnasi, Ahmed Fathei, *Al Uquba Fi Al Fiqh Al Islami*, (English: *The Penalty in the Islamic Jurisprudence*), 93-97, Dar Al Shorouk, (Cairo, 1983).

### C. Apostasy

In addition to the crime of adultery and the controversial opinions on the stoning-to-death penalty, Islamic law scholars are in dispute over the concept of apostasy.<sup>54</sup> The Quran does not state any specific penalty for apostasy. Furthermore, there were different people who declared their apostasy to the prophet, and he chose not to impose any punishment on them. However, there is a prophetic tradition that was narrated stating that the prophet said, “The one who changes his religion, must be killed.” Islamic law scholars have interpreted this prophetic tradition in many different ways, leading some scholars to recognize the death penalty in cases of apostasy and others not to do so.<sup>55</sup>

Most of the prominent contemporary Islamic law scholars do not recognize the death penalty as a punishment for apostasy, and criticize the authenticity of the prophet’s tradition. They also rely on the fact that the Quran, the primary source of Islamic law, does not prescribe a penalty for apostasy. Additionally, they claim that those Islamic law scholars who supported the death penalty for apostasy in the past were using a different definition of the term. The contemporary meaning is the act of leaving one’s religion, but in the past, apostasy was the act of leaving the Muslim’s army to join the enemies’ armies.<sup>56</sup> Because women were not allowed to serve in the army, women were not capable of committing apostasy and thus, were not subject to the death penalty in this instance.

To summarize: Although some Islamic law scholars would prescribe the death penalty as a punishment for the crime of apostasy, the Quran does not include any specific penalty for this crime. These scholars are also relying on a contemporary definition of apostasy – leaving one’s religion –

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<sup>54</sup> Bahnasi, *supra* note 9, at 50.

<sup>55</sup> Wood, Asmi, *Apostasy in Islam and the Freedom of Religion in International Law, Freedom of Religion under Bills of Rights*, Babie, Paul & Rochow, Neville ed., 152–171, University of Adelaide Press, (South Australia, 2012). Retrieved from, [www.jstor.org/stable/10.20851/j.ctt1t3051j.13](http://www.jstor.org/stable/10.20851/j.ctt1t3051j.13).

<sup>56</sup> Al-Alwani, Taha Jabir, *Apostasy in Islam: A Historical & Scriptural Analysis*, International Institute of Islamic Thought, (Herndon, VA, 2012). Retrieved from, [http://www.iiit.org/uploads/4/9/9/6/49960591/books-in-brief\\_apostasy\\_in\\_islam\\_a\\_historical\\_and\\_scriptural\\_analysis.pdf](http://www.iiit.org/uploads/4/9/9/6/49960591/books-in-brief_apostasy_in_islam_a_historical_and_scriptural_analysis.pdf).



instead of the definition of apostasy at the time of the Quran – leaving the Nation’s army to join enemy forces. Moreover, the Quran declares the absolute freedom of the whole people to believe or disbelieve.<sup>57</sup> Finally, the authentic tradition from the prophet says that the prophet did not punish people who refused Islam and left it for another religion.<sup>58</sup>

### **E. Intentional Murder**

The last crime for which the death penalty is a possible punishment in Islamic law is the crime of intentional murder. This crime is classified under the Qisas category,<sup>59</sup> which justifies the use of the death penalty based on the philosophy of retaliation – harming the offender in the same way that he harmed the victim.<sup>60</sup>

In general, Islamic law divides the crime of homicide into several categories that vary depending on the Islamic school of jurisprudence. For example, the Hanafi school has divided homicides into five types: deliberate, quasi-deliberate, accidental, equivalent to accidental, and indirect. Islamic law scholars have different methods of categorizing homicides; however, all Islamic law scholars agree that the death penalty shall be applied only in cases of a deliberate homicide.<sup>61</sup>

Deliberate homicide, or intentional murder, is defined as “homicide committed with the actual intention to kill.”<sup>62</sup> According to the definition, two main elements must be fulfilled for a crime to be considered intentional murder.<sup>63</sup> First, the offender must have the intention to kill; namely, if the

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<sup>57</sup> The Quran says, “Say: “The truth is from your Lord”. So, whoever wills - let him believe; and whoever wills - let him disbelieve”, *Al Kahf Chapter*, 18-29. It also says, “There shall be no compulsion in the religion”, *Al Baqra Chapter*, 2: 256.

<sup>58</sup> Wood, *supra* note 55.

<sup>59</sup> Peters, Rudolph, *Crime and Punishment in Islamic Law—Theory and Practice from the Sixteenth to the Twenty-First Century*, 38-52, (Cambridge, 2005).

<sup>60</sup> Bassiouni, *supra* note 2, at 139.

<sup>61</sup> Anderson, J. N. D. *Homicide in Islamic Law*, *Bulletin of the School of Oriental and African Studies, University of London*, vol. 13, no. 4, 1951, pp. 811–828. Retrieved from, [www.jstor.org/stable/609017](http://www.jstor.org/stable/609017).

<sup>62</sup> Awa, *supra* note 7, at 75.

<sup>63</sup> Bahnasi, *supra* note 19, 72- 83.

offender commits the crime without having the requisite intent, the homicide will not be classified as deliberate. Second, the murder or the death of the victim must be actually caused by an act that is attributable to the offender, with no discontinuity between the act of the murder and the death of the victim.<sup>64</sup>

Even if the two required elements of the crime are met, Islamic law scholars state some additional limitations on when a homicide may be classified as deliberate. The offender must be sane, must have attained the age of discretion, and must not be under duress at the time of committing the murder. In other words, minors, mentally ill persons, and persons under duress who commit murder cannot fall under the category of deliberate homicide, due to the absence of their will.<sup>65</sup>

The only type of murder that is punishable by the death penalty is one that is committed with the full intention and the clear will to kill. However, this crime of deliberate homicide is classified as a Qisas crime, which gives the right to the victim's family to choose either the death penalty, or the alternative of blood money.<sup>66</sup> Moreover, some Islamic law scholars have stated that the legitimate authority has the right to oblige the people – by enacting a law – to accept blood money, in order to avoid the use of the death penalty.<sup>67</sup>

In conclusion, Islamic law sources are varied and differ in their degrees of authenticity depending on whether it is a primary source or a supplementary source. The primary and more authentic sources only prescribe the death penalty for three types of crimes: two Hudud crimes, armed robbery that leads to death and armed rebellion that leads to death, and one Qisas crime, deliberate homicide. In contrast, other supplementary sources, which are not binding or obligatory because they

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<sup>64</sup> Auda, *supra* note 40, at 25.

<sup>65</sup> Bahnasi, *supra* note 46, at 215.

<sup>66</sup> Bassiouni, Cherif, *Qesas Crimes*, in Bassiouni, Cherif, ed. *The Islamic Criminal Justice System*, 203-209, (New York, Oceana, 1982).

<sup>67</sup> Bahnasi, *supra* note 9, at 159.

are based on Islamic law scholars' interpretation of the primary sources, prescribe the death penalty for two additional crimes, apostasy and adultery, neither of which are explicitly mentioned in the Quran. Some of those scholars justify the use of the death penalty for these crimes by categorizing them as Ta'zir crimes, as a way of vesting the authority with the discretionary power to prescribe the death penalty.<sup>68</sup>

### **3. THE TENDENCY OF ISLAMIC LAW TO AVOID THE IMPOSITION OF THE DEATH PENALTY**

#### **A. Introduction**

The primary and supplementary sources of Islamic law always urge leniency when deciding whether to impose the death penalty. The commands of forgiveness and lenity are derived from the first and primary source of Islamic law – the Quran. After the Quran prescribes the death penalty as a retaliation for deliberate homicide to be approved by the victim's family, it maintains that forgiveness, remission, and lenity are preferable to the death penalty.<sup>69</sup> The Quran states that the death penalty is a way of achieving justice for the victim and maintaining the victim's right against the offender. But Islamic law also offers blood money as an alternative punishment – imposing a moral retribution on the offender – that also achieves justice for the victim while finding a way to save the life of the offender.<sup>70</sup>

The second primary source of Islamic law, the Sunnah, follows the same philosophy of the Quran by urging and motivating societies to forgive and accept blood money rather than impose the

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<sup>68</sup> Benmelha, Ghaouti, *Ta'zir Crimes*, in Bassiouni, Cherif, ed. *The Islamic Criminal Justice System*, 211-226, (New York, Oceana, 1982).

<sup>69</sup> The Quran says "O you who have believed, prescribed for you is legal retribution for those murdered - the free for the free, the slave for the slave, and the female for the female. But whoever overlooks from his brother anything, then there should be a suitable follow-up and payment to him with good conduct." *Al Baqra Chapter*, 1: 178. It also says, "And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives [up his right as] charity, it is an expiation for him", *Al Maeda Chapter*, 5: 45

<sup>70</sup> Bahnasi, *supra* note 19, at 11. See also, Abu Zahra, *supra* note 28, at 498.

death penalty.<sup>71</sup> The Sunnah tells us that the prophet encouraged people to accept blood money by promising them many rewards in life and in the afterlife. This was a way of maintaining the philosophy of forgiveness and limiting the scope of execution through the right of blood money.

In addition to the two primary sources of Islamic law, the Quran and the Sunnah, the supplementary sources of Islamic law have also relied on the philosophies of lenity and forgiveness to limit the extent of the death penalty.<sup>72</sup> The classical schools of Islamic law have worked on many of the maxims, principles, and theories of Islamic criminal law as a way of restricting the scope of execution, saving the lives of humans and limiting the scope of such severe penalties. For example, Islamic law scholars require numerous procedural conditions for the witnesses of crimes, and a demonstration of clear and explicit will in cases of deliberate homicide. The scholars also oblige governments to pay blood money in cases involving poor offenders, and vest the legitimate authority with power to enact laws that oblige the victim's family to accept blood money and waive the death penalty right. Lastly, the scholars expanded the reach of the maxims of uncertainty and doubt to avoid the imposition of the death penalty.<sup>73</sup>

In addition to the role of the primary and supplementary sources of Islamic law, Islamic law has many procedural rules, principles, and philosophies that help to limit the scope of the death penalty by increasing leniency.

### **B. Limiting the Death Penalty to Three Crimes**

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<sup>71</sup> Anas Ibn Malik narrated that "I never saw the prophet that some dispute, which involved retaliation, was brought to him but he commanded regarding it for remission", *Sunan Abi Dawud* 4497, Book 41, Hadith 4. He also narrated that "No case requiring retaliation was ever brought to the prophet, but he would enjoin pardoning". *Sunan an-Nasa'i*, 4784, Book 45, Hadith 79.

<sup>72</sup> Rabb, Intisar A, *The Islamic Rule of Lenity*, *Vanderbilt Journal of Transnational Law* 44, no.5, 1299-1351, (2011).

<sup>73</sup> Salama, Maamoun. *General Principles of Criminal Evidence in Islamic Jurisprudence*, in Bassiouni, Cherif, ed. *The Islamic Criminal Justice System*, 109-123, (New York, Oceana, 1982).

The consensus of the Islamic law schools is that the death penalty is only available as a punishment for three main crimes: deliberate homicide, armed robbery leading to death, and armed rebellion leading to death.<sup>74</sup> Moreover, prominent contemporary Islamic law scholars similarly maintain the death penalty for these three main crimes that lead to death, and argue against the claim of prescribing the death penalty for apostasy or adultery.<sup>75</sup> Additionally, Islamic law schools have restricted the definition of deliberate homicide to require intent and the clear will of the offender to kill; otherwise, the crime does not fall under the category of deliberate homicide, and the death penalty shall not be prescribed.<sup>76</sup> Even if a crime falls under the definition of deliberate murder, the death penalty can be avoided if the offender agrees to pay blood money after approval from the victim's family or the legitimate authority.

In addition to the many possibilities of avoiding the death penalty even in cases of intentional murder, Islamic law states several criminal procedural rules and conditions that also limit the application of the death penalty. These procedures must be fulfilled in order to execute the death penalty, even for the three crimes which lead to death. For example, armed rebellion must actually lead to death, and the death penalty may only be prescribed to stop the rebellion. So, once the legitimate authority quashes the rebellion, the authority has no right to execute the captured people. The same principle applies in cases of armed robbery; if the robbers renounce the criminal activity before they are arrested, the authority shall not execute them.<sup>77</sup>

In short, Islamic law limits the death penalty to a finite number of crimes and imposes some complicated procedural rules that make the death penalty the last option for these crimes.

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<sup>74</sup> Bassiouni, *supra* note 2, at 134.

<sup>75</sup> Such as Imam Abo Zahra, Al Qaradawi, Taha Jabir Al Alwani, Imam Mahmoud Shaltout and Imam Mostafa Al Zarqa; all those mentioned scholars are of the most prominent people in the field of Islamic law.

<sup>76</sup> Anderson, *supra* note 62.

<sup>77</sup> Auda, *supra* note 41, at 659.

### C. The Exclusive Criminal Procedures for Harsh Criminal Sanctions

The criminal procedure rules that must be followed in order to apply the death penalty are complicated and sophisticated, so as to avoid execution as much as possible. Of the seven types of homicide classified by Islamic law schools, the death penalty is only prescribed for one: deliberate homicide. To prove deliberate homicide, the offender must have directly caused the homicide; an omission or an indirect act is insufficient.<sup>78</sup> Additionally, there are stringent standards pertaining to testimony, including a statute of limitations for witnesses and the right of the offender to withdraw his confession. As elaborated in the next section, judges are also encouraged to rely on the doubt maxim as another reason not to apply the death penalty.<sup>79</sup> Another example of a complicated criminal procedure, designed to decrease the occasions in which the death penalty is applied, is the exception for renunciation. Islamic law scholars agree that offenders of an armed rebellion shall not be subject to the death penalty if they quit their criminal activity before the authority arrests them. While the primary sources do not explicitly state all of these procedures, prevailing Islamic law school interpretations of the purposes of the death penalty in the Islamic jurisprudence motivated them to stipulate all of these procedures.<sup>80</sup>

### D. The Impact of the Doubt Maxim on the Death Penalty

In addition to the above-mentioned rules, Islamic law has adopted an interesting legal maxim called the doubt maxim. This maxim is derived from the prophetic tradition which states, “Avoid

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<sup>78</sup> For example, the Hanafi Islamic law School states that killing by poisoning or killing by the intentional poisoning of the victim till the death is not deliberate homicide, so the offender shall not be executed. They also add, the intentional murder must be due to an act of direct killing, such as using a knife or gun which leads to the direct death of the victim. Thus, any direct or indirect tool intervene in the reason of the death leads to the moving of the murder degree from the deliberate homicide to the other categories which keep the offender away from the death penalty. See, Peters, *supra* Note 59.

<sup>79</sup> Badawy, Tarek, *Towards a Contemporary View of Islamic Criminal Procedures: A Focus on the Testimony of Witnesses*, Arab Law Quarterly, vol. 23, no. 3, 269–305, 2009. Retrieved from, [www.jstor.org/stable/40604746](http://www.jstor.org/stable/40604746).

<sup>80</sup> Lippman, Matthew, *Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law*, Boston College International and Comparative Law Review 12.1, 29-62, (1989).

imposing criminal sanctions in cases of doubt.”<sup>81</sup> In another tradition, the prophet said, “Avoid hudud punishments to the extent possible; if there is any way out, then release [the convict], as it is better that the judge makes a mistake in pardoning than in punishing.”<sup>82</sup> This prophetic principle was the main tool, in the hands of Islamic law scholars, to establish the criminal procedure of Islamic law that restricts the scope of the imposition of the death penalty and the other severe penalties as well.<sup>83</sup> The doubt maxim was the reason behind the declaration by the Islamic law schools of stringent conditions on who may be a witness in criminal cases. Furthermore, those Islamic law scholars who apply the death penalty to adultery crimes say that the offender has the right to withdraw his confession of committing adultery in order to save his life from execution, pursuant to the doubt maxim. Additionally, Islamic law scholars agree that a judge cannot impose the death penalty as a punishment for crimes for which there is no jurisprudential consensus, such as stoning to death for adultery crimes or the death penalty for the crime of apostasy. Indeed, most of these criminal procedures and theories are not stated in the primary source of Islamic law; however, the understanding of Islamic law schools of the purposes of the severe penalties leads them to stipulate all of these conditions under the doubt maxim.<sup>84</sup>

In short, the doubt principle in the history of Islamic law schools confirms that a general aim of Islamic law is to decrease or to avoid the use of the death penalty as much as possible. The Islamic law schools added many of the criminal procedure rules that help to increase the circle of doubt, and oblige judges to choose any sanction other than the death penalty.

### **E. The Difficulties and Sophistications of Required Witness Conditions**

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<sup>81</sup> Al-Baihaqi transmitted on the authority of 'Ali, Book 10, Hadith 1221.

<sup>82</sup> Jami` at-Tirmidhi, 1424, Book 17, Hadith 2.

<sup>83</sup> Rabb, Intisar A, *Doubt's Benefit: Legal Maxims in Islamic Law, 7th-16th Centuries*, Princeton University, Ann Arbor, (2009).

<sup>84</sup> Rabb, Intisar A, *Reasonable Doubt in Islamic Law*, Yale Journal of International Law 40.1, 41-94, (2015).

In addition to the right of the offender to withdraw his confession to save himself from criminal sanctions and the imposition of the death penalty, Islamic law schools also require several complicated conditions that must be met in order for a witness to be qualified in procedures involving criminal sanctions.<sup>85</sup> Although the primary sources of Islamic law do not state all of these required conditions for witnesses, the philosophy of these Islamic jurisprudence schools led them to create all of these new conditions. The motivation behind these stringent standards includes the need to increase the doubt circle in order to save the lives of the people, and the desire to avoid criminal sanctions and the death penalty.

Islamic law scholars state that witnesses must be legally mature<sup>86</sup> (i.e., not a child); mentally competent; capable of expressing what he witnessed; and unrelated to the offender. Additionally, the witness must see the crime while it is committed and not just hear about it; must have integrity and not have committed any crimes previously; and must be free of previous disputes or mutual interests with the offender. A narrow statute of limitations applies to the testimony of witnesses, further reducing the possibility of using the testimony.<sup>87</sup> And finally, most of the jurisprudence schools add that the witnesses must be male, not female,<sup>88</sup> claiming that because males are engaged in life more than females, they are more able to see the crimes.<sup>89</sup>

While none of these conditions are mentioned explicitly in the primary sources of Islamic law, Islamic law schools insist on these procedural rules as a way of avoiding the death penalty and severe

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<sup>85</sup> M. Lippman, S. McConville and M. Yerushalmi, *Islamic Criminal Law and Procedure, An Introduction*, 50-76, (Greenwood Press, 1988). See, Lippman, *supra* Note 80.

<sup>86</sup> Bahnasi, Ahmed Fathei, *Assyas Al Jina'iya Fi Al Shariea Al Islamiyah*, (English: *The Criminal Policy in The Islamic Jurisprudence*, 388-406, Dar Al Shorouk, (Cairo, 1988).

<sup>87</sup> Bahnasi, Ahmed Fathei, *Nadhariyat fi Al Fiqh Al Jinaei Al Islami*; Deras Muqarnah, (English: *Theories in The Islamic Criminal Jurisprudence; a comparative study*), 207-216, Dar Al Shorouk, (Cairo, 1988).

<sup>88</sup> Abu Zahra, *supra* note 16, at 62. Auda, *supra* note 40, 315-317.

<sup>89</sup> Fadel, Mohamed, *Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought*, *International Journal of Middle East Studies*, (1997). See also, Al-Alwani, Taha Jabir, *The Testimony of Women in Islamic Law*, *The American Journal of Islamic Social Sciences*, Vol. 13 No. 2, (Summer 1996). Retrieved from, <http://www.alhewar.com/TahaTestimony.htm>.



criminal sanctions. If any one of these conditions is absent, the doubt maxim is implicated, thus requiring the judge to avoid harsh criminal sanctions and instead apply an alternate penalty. In short, the reason for stating some conditions on witnesses in aggravated crimes include the general attitude of Islamic law schools to avoid the death penalty as much as possible and the doubt maxim.

#### **F. The Right of The Victim's Family to Waive the Death Penalty**

According to Islamic law, the death penalty is prescribed for three main crimes: armed rebellion and robbery that lead to death; Hudud crimes; and deliberate homicide, a Qisas crime. Concerning the Qisas crimes, which are related to the people's rights, Islamic law has labelled it as a personal right; namely, the harmed party has the right to insist on or waive the penalty, either in the case of a deliberate murder or in a deliberate wounding crime.<sup>90</sup>

For both a deliberate murder and a deliberate wounding crime, the victim has the right to choose to receive blood money as an alternative to the death penalty. Moreover, some Islamic law scholars give the right to the legitimate authority, through enacted law, to enforce the victim's family's right to waive the death penalty and accept blood money.<sup>91</sup> The reason that there is a rule that allows the whole community to replace the death penalty with blood money is the idea that the offender is not just harming the family of the victim, he is harming the whole community.<sup>92</sup> It is worthy of mention that, although Islamic law gives the right to the victim's family to choose the death penalty or waive it, the legitimate authority still has the right to state any penalty other than execution; in other words, the forgiveness of the victim or his family does not mean releasing the offender of all penalties.<sup>93</sup> Islamic law does not require that each member of the victim's family must agree to waive the death penalty. The

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<sup>90</sup> Hascall, Susan C, *Shari'ah and Choice: What the United States Should Learn from Islamic Law about the Role of Victims' Families in Death Penalty Cases*, John Marshall Law Review 44.1, 1-68, (2010).

<sup>91</sup> Bahnasi, *supra* note 9, at 159.

<sup>92</sup> Qazamel, Seif Ragab, *Al'Aqela Fi AL Fiqh AL islami; Derasa Muqarnah*, (English: *The Concept of Blood relative's male in the Islamic Jurisprudence; a Comparative Study*), Al Ishaa'a Al Faniya Press, (Cairo, 1999).

<sup>93</sup> Bahnasi, *supra* note 87, at 379.

approval of the waiver by any one of the relatives is sufficient to avoid the imposition of the death penalty.<sup>94</sup>

The main purpose of this right of waiver is derived from the general philosophy of Islamic law that the death penalty should be avoided whenever possible.<sup>95</sup> Indeed, the victim or the family that will be compensated in lieu of seeking the death penalty will necessarily give careful deliberation to the consequence of hanging the offender and the interest they will gain. By contrast, giving this right to the state will not lead to the same consequence of sidestepping the execution, because the state will not be compensated like the victim or his family would be. The family will have a financial motivation to accept blood money over the death penalty as punishment, as opposed to the state who will be always motivated to impose the death penalty.

In short, by giving the right to the family to impose a penalty other than the death penalty as punishment for intentional murder or intentional wounding, Islamic law defines such a crime as a personal wrong that places the death penalty decision in the hands of the victim or his family.

### **G. Blood Money**

As a consequence to the aforementioned principle of giving the victim's family the right to waive the execution, Islamic law provides an alternative monetary punishment – blood money – as a motive to the victim's family to forgive the offender and receive compensation instead of insisting on the death penalty.<sup>96</sup> Islamic law allows blood money as a form of punishment for Qisas crimes, which include homicide and wounding crimes that were either deliberate, quasi-deliberate, accidental, equivalent to accidental, or indirect. The amount of blood money is different based on the degree of severity of the

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<sup>94</sup> Bahnasi, *supra* note 19, at 183.

<sup>95</sup> Peters, *supra* note 59, at 49-52.

<sup>96</sup> Bahnasi, *supra* note 26, at 15.

homicide or wounding crime.<sup>97</sup> Blood money is classified as a compensation and a penalty at the same time. It is a compensation because, if the victim waives his right to blood money, the judge cannot oblige the offender to pay it; and it is a penalty because it is stated as a punishment for some crimes.<sup>98</sup> The basic rule for blood money is that it is to be paid by the offender, but if the offender is indigent, his family will be obliged to pay it. Islamic law scholars state that the government is obliged to pay the blood money in cases where neither the offender nor his family can pay.<sup>99</sup>

Blood money is obligatory for quasi-deliberate, accidental, equivalent to accidental, or indirect murder. This means that if the offender lacks criminal intent that is normally required for the imposition of the death penalty, blood money will be required.<sup>100</sup> It thus follows that an offender who is mentally ill or is a minor cannot meet the requisite intent, and would be obliged to pay blood money. Also, if there is any doubt surrounding the crime, the judge is obliged to follow the doubt maxim and impose blood money as punishment instead of the death penalty.<sup>101</sup>

Indeed, blood money is an important tool in punishment policy; no matter what the circumstances of the crime, blood money will be imposed. An offender cannot escape the imposition of blood money by reasons of insanity, minority, or even death.<sup>102</sup> Moreover, in cases where the authority fails to find the offender, the state is obliged to pay the blood money to the victim or his family.<sup>103</sup>

In conclusion, blood money is one of the main issues that must be taken into the consideration when analyzing the Islamic legal systems that aim to restrict the scope of execution. In general, the

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<sup>97</sup> *Id.*

<sup>98</sup> Auda, *supra* note 13, at 668.

<sup>99</sup> Neawshi, Majed, *Tasawwur Mua'sir Li Tahamul Al Diya 'an Al 'Aqela*, (English: *A Contemporary Hypothesis to The Blood Money*), Arab Law Info, (Amman, Jordan 2000).

<sup>100</sup> Peters, *supra* note 59, at 49.

<sup>101</sup> Abu Zahra, *supra* note 28, at 520.

<sup>102</sup> Bassiouni, M. Cherif, *Crimes and the Criminal Process*, Arab Law Quarterly, vol. 12, no. 3, 269–286, (1997). Retrieved from, [www.jstor.org/stable/3381843](http://www.jstor.org/stable/3381843).

<sup>103</sup> Bahnasi, Ahmed Fathei, *Nathariyat Al Ithbat Fi Al Fiqh Al Jinaei Al Islami*, (English: *The Evidencing Theory in The Islamic Jurisprudence*), 227-235, Dar Al Shorouk, (Cairo, 1989). Auda, *supra* note 13, at 674. *Supra* note 33.

concept of blood money involves two competing policy goals: achieving justice for the victim by giving him the right of insisting on the penalty, and recognizing the offender's right to try and save his own life by convincing the victim's family to accept the blood money.<sup>104</sup>

#### **H. Categories of People Who Are Exempt from the Death Penalty**

In addition to the previous policies, procedures, and theories, Islamic law identifies some specific categories of people who are excluded from the execution of the death penalty, even if they commit crimes that would normally call for the death penalty. Importantly, the exclusion of those people from the death penalty does not prevent the state from imposing other sanctions.<sup>105</sup> Additionally, the main purpose of excluding these people from the death penalty comes from Islamic law's preference for punishments that do not result in death. Furthermore, Islamic law excludes these categories of people because their death would not achieve the main purpose behind the death penalty. Thus, Islamic law excludes these people as a way of achieving the general policy of punishing and avoiding capital punishment.

##### *i. Parents Who Kill their Children*

The first category of people who are excluded from the death penalty are parents who kill their children.<sup>106</sup> The origin of excluding parents from execution is derived from the prophetic tradition which says, "The Prophet said to the man who complained to him about his father who took possession of his property: 'You and your property belong to your father.'"<sup>107</sup> Also, the prophet Mohamed said, "The parents are not punished by death for killing their sons or children."<sup>108</sup> It is important to note that

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<sup>104</sup> Anderson, *supra* note 61.

<sup>105</sup> Benmelha, *supra* note 68.

<sup>106</sup> Abu Zahra, *supra* note 28, at 376.

<sup>107</sup> Sunan Abi Dawud, 3530, Book 24, Hadith 115.

<sup>108</sup> Jami` at-Tirmidhi, 1401, Book 16, Hadith 17.

Islamic law scholars include grandparents within the meaning of parents – meaning that if grandparents kill their grandchildren, they shall not be subject to the death penalty.<sup>109</sup>

Islamic law scholars justify the exclusion of the parents from the death penalty for two main reasons. First, the crime of murder places the decision of which punishment to seek, death penalty or blood money, in the hands of the victim's family. Since the decision about the execution would then be in the hands of the offender (i.e., the parents), the death penalty would never result in any case.<sup>110</sup> Second, according to the philosophy of Islam toward the parent-child relationship, parents are considered to be the owners of their children; this means that parents, metaphorically, possess their children, which means the circle of doubt maxim will always extend to this crime to avoid the imposition of the death penalty.<sup>111</sup> Finally, while the primary sources of Islamic law only provide an exclusion for the father, Islamic law schools have interpreted the purpose behind the exclusion and decided that it should extend not only to the father, but also to the mother and the grandparents.<sup>112</sup> Importantly, the exclusion of parents from being executed does not prevent the state from imposing another punishment other than the death penalty.

#### *ii. Parents Who Kill their Spouse*

The second category of people who are excluded from the death penalty are parents who kill their spouse. The main reason behind this exclusion is that the victim's family has the right to decide whether to seek the death penalty or not; consequently, in this case, the right would be in the hands of the children, who would be faced with losing both parents if the death penalty were imposed on the offender.<sup>113</sup> This exclusion is also supported by the doubt maxim and the understanding of the purpose

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<sup>109</sup> Bahnasi, Ahmed Fathei. The Criminal Responsibility in Islamic Law, in Bassiouni, Cherif, ed. *The Islamic Criminal Justice System*, 171-194, (New York, Oceana, 1982).

<sup>110</sup> Abu Zahra, supra Note 28.

<sup>111</sup> Auda, supra Note 13, at 518.

<sup>112</sup> Bahnasi, supra Note 109.

<sup>113</sup> Abu Zahra, supra Note 28, at 379.

of the death penalty in Islamic law. Furthermore, the exclusion of this category from capital punishment is a consequence of the first category's exclusion; namely, since parents cannot be executed for killing their children, the children – who are the victim's family – would also be obliged to waive the death penalty, because they cannot seek the execution of one of their own parents. In addition to the aforementioned reasons for this exclusion, Islamic law scholars add that imposing the death penalty on one of the parents because he or she killed the other parent would lead to the children losing both of their parents and doubling the catastrophe.<sup>114</sup> Finally, the exclusion is only for capital punishment, and the state still has the right to impose another sanction.

### *iii. Relatives Who Kill Other Family Members*

The third category encompasses cases of murder in which one relative murders another relative. However, not all intra-family murders fall into this category; the exclusion is restricted to cases in which the decision of whether or not to seek the death penalty is in the hands of the offender's children or grandchildren. This is because these children cannot seek the execution of their parents. For example, in the case of the second category of people excluded from the death penalty – murder between parents – the son cannot be required to impose the death penalty on his parents. Another example: If an offender kills one of his siblings, and the son of the offender is the one who has the right to waive or impose the death penalty, then the offender is excluded. A third example: If a woman kills her brother-in-law, and her son is the one who has the right to impose or waive the death penalty, the woman shall be excluded because he cannot seek the death penalty for his mother. One last example is if the offender kills his brother-in-law, then the son of the victim cannot be required to kill his grandparent.

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<sup>114</sup> *Id.*

It is worth mentioning that it is not required that all members of the victim's family must agree to waive the death penalty; any one of the victim's relatives has the right to waive the execution.<sup>115</sup> In other words, the very existence of the offender's son or grandson effectively precludes requiring the imposition of the death penalty against such an offender.

In addition to the named categories of people who are excluded from the death penalty, there are also other situations that prevent the death penalty from being imposed against some offenders. Examples include: if the offender killed in self-defense; if the offender killed a rapist; and if the offender killed to avenge the family's honor crimes.<sup>116</sup>

In conclusion, the general aim of Islamic law is to avoid the death penalty by all available means necessary. As discussed above, Islamic law develops, stipulates, and requires many conditions and theories that make the death penalty the last choice of punishment even for the three most severe crimes. Indeed, the fact that Islamic law has created alternative options for capital punishment is clear evidence of its efforts to restrict the scope of the imposition of the death penalty. It is not only the primary sources of Islamic law that strive for this goal; the jurisprudence of Islamic law schools also contributes to reducing the use of the death penalty by restricting the scope of its application.

Finally, since the Egyptian Constitution states that the principles of Islamic law are the main sources for legislation, Egyptian criminal law is obliged to follow the Islamic criminal procedure rules regarding the imposition of the death penalty. Islamic law procedural theories are the appropriate way to achieve the criminal justice policy of avoiding the death penalty. The next chapter focuses on the

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<sup>115</sup> Al Fakhri, Ghaith Mahmoud, *Al 'afw 'An Al Janei Fi Jariemat Al Qatl Al 'amd*, (English: *The Forgiveness's Consequence in The Deliberate Homicide*, Legal Studies Journal, 16, 248-280, Qaryunus Law school, Libya.

<sup>116</sup> Such as, the one who is killing his wife, sister or a woman in his family who is committing the adultery crime. Indeed, the offender will be liable, but the murder motive excludes him from the execution.

policies that the Egyptian criminal law shall follow to restrict the death penalty through the rules and theories of the Islamic criminal procedure law.



# Chapter Three

**What Should Egyptian Criminal Law Learn  
from Islamic Law about the Imposition of the  
Death Penalty?**

## 1. INTRODUCTION

Egyptian criminal law needs to consider the reform of the death penalty. The most appropriate criteria to depend upon in this regard is Islamic law, due to its constitutional and cultural obligations on the Egyptian legislature. Moreover, the Islamic legal rules that govern the imposition of the death penalty are consistent with contemporary international human rights laws, as well as the international requirements of death penalty reform campaigns. Furthermore, the reform of the death penalty under Egyptian law, based on Islamic law rules, must include both the substantive and procedural rules of the death penalty. This chapter will discuss the rules and procedures of Islamic law that Egyptian laws should follow in order to reform and restrict the imposition of the death penalty. At the outset is a brief introduction to the constitutional and cultural obligations that require Egyptian law to follow these rules.

### A. The Constitutional Obligation to Follow Islamic law

Article 2 of the Egyptian Constitution states, “The principles of Islamic Shariea are the principal source of legislation.”<sup>1</sup> This has been interpreted to mean that the entirety of the Egyptian legal code must be in accordance with Islamic law; otherwise, the code will be contrary to the Egyptian Constitution. Additionally, the Egyptian Supreme Constitutional Court has stated that “Article 2 of the Egyptian Constitution is a constitutional obligation imposed on the Egyptian legislator to [not enact any law which contradicts the conclusive rules of Islamic law].”<sup>2</sup> The court has also stated, “It is not allowed to enact any law that contradicts the conclusive rules of Islamic law, and the Supreme Court has the

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<sup>1</sup> Constitution of the Arab Republic of Egypt [Egypt], 18 January 2014, available at; [https://www.constituteproject.org/constitution/Egypt\\_2014.pdf?lang=en](https://www.constituteproject.org/constitution/Egypt_2014.pdf?lang=en)

<sup>2</sup> Cases no. 67, 68, of Sep. 7, 1996, The Supreme Constitutional Court (*Al Mahkama Al Dustoriya Al Uliya*) [Egyptian Judicial review] no. 8, p. 133.

jurisdiction to observe the consistency of the Egyptian legislation with Article 2 of the Constitution.”<sup>3</sup>

And the court has added, “Since the Egyptian Constitution contains the article on Islamic law, Egyptian legislation is obliged not to enact any code or law which contradicts the conclusive sources and interpretation of Islamic law.”<sup>4</sup> Consequently, the Egyptian Constitution, as well as the Supreme Constitutional Court, obliges the Egyptian legislator to enact codes which are not contradictory to the conclusive rules of Islamic law. Thus, both the substantive and procedural rules for the imposition of the death penalty shall not contradict Islamic law rules.

### **B. The Social and Cultural Obligation to Follow the Rules of Islamic law.**

In addition to the constitutional obligation to follow the rules of Islamic law, there are cultural and social aspects that play an important role in motivating Egyptian law to follow the rules of Islamic law. The modern history of the law in Egypt maintains that the people have no chance to choose their law based on their cultures, beliefs, or social life. Most of the Egyptian codes are based on Western laws as a result of the intervention of Western countries during the formation of Egyptian laws and other Arabic legal systems as well.<sup>5</sup> For example, one of those codes, which was imposed on the Egyptian community without consideration for their opinion, was the Egyptian criminal code. Egyptian criminal law finds its origins in the French, Italian, English, and Indian legal systems.<sup>6</sup> Even contemporary criminal

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<sup>3</sup> Case no. 26, of Nov. 16, 1996, The Supreme Constitutional Court (*Al Mahkama Al Dustoriya Al Uliya*) [Egyptian Judicial review] no. 8, p. 162.

<sup>4</sup> Case no. 34, of Jan. 4, 1997, The Supreme Constitutional Court (*Al Mahkama Al Dustoriya Al Uliya*) [Egyptian Judicial review] no. 8, p. 209.

<sup>5</sup> Wood, Leonard G. H. *Islamic Legal Revival: Reception of European Law and Transformations in Islamic Legal Thought in Egypt, 1875-1952*, Oxford: Oxford University Press, 2016. Peters, Rudolph, *Crime and Punishment in Islamic Law—Theory and Practice from the Sixteenth to the Twenty-First Century*, 38-52, (Cambridge, 2005). See also, Wasti, Tahir, *The Application of Islamic Criminal Law in Pakistan: Sharia in Practice*, Leiden: Brill, 2009.

<sup>6</sup> ‘Ibid, Raouf, *Mabadiea Al Qism Ala’ m mina al Altashriea’ Al Iqabi Al Masry* (English, *The Egyptian penal legislation; the general section*), Nahdet Masr Press, (Cairo, 1964). See also, Zanati, Mahmoud Salam, *Tarikh Al Qanun Al Masry* (English, *The History of The Egyptian Law*), Dar Al Nahda Al Arabia, (Cairo, 1973).

laws, including amendments within the last century, have not been enacted with Islamic law as a source of the legislation.

However, a majority of the Egyptian population thinks that Islamic law should be a source for their legal system. According to a survey by Gallup World Poll, approximately 79% of the Egyptian people agree that Islamic law must be a source for legislation.<sup>7</sup> Since the death penalty is codified, the cultural nature of the Egyptian community obliges the legislature to reform this penalty according to Islamic law.

In addition to the mandatory effect of Islamic law on the legislator, there is another important factor that should be taken into consideration. The international campaign against the death penalty largely comes from secular and Western law. The UN also puts pressure on its members to reform the death penalty or to abolish it, theoretically or practically. The response of the Egyptian legislator toward the death penalty reform will be more practical if it is based on the cultural and social nature of the Egyptian community, rather than on the suggestions by the international anti-death penalty campaign or the UN. Importantly, reform that is based on the beliefs of the community will be more effective than reform that is based on external factors.<sup>8</sup>

In short, the death penalty reform in the Egyptian legal system will be more practical and effective if proper considerations are given to the nature of Egyptian society, the Egyptian people's beliefs, and the Egyptian communities' customs and traditions. In other words, amending or reforming

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<sup>7</sup> Gallup World Poll, "Special Report; Muslim World", The Gallup Organization Princeton, 2006.

<sup>8</sup> The clear example for this situation is Turkey, which was abolished the death penalty based on the pressure of the EU, and other external factors, as well. These days, the government is threatening to retain the penalty another time, and it meets a welcome from the people to retain it again, see, <http://www.middleeasteye.net/news/erdogan-threatens-refugee-treaty-after-eu-vote-block-turkish-membership-talks-1980817198>. See also, <https://www.almonitor.com/pulse/originals/2016/07/turkey-coup-attempt-death-penalty.html>.

the death penalty in the Egyptian legal system based on non-local sources or legal traditions is a futile attempt that will not be sustainable over a long period of time.

### **C. The Contemporary Need to Follow the Rules of Islamic Law on the Death Penalty**

The United Nations, as well as the international campaign against the death penalty, are currently playing a large role in reforming the death penalty around the world.<sup>9</sup> Most of the countries that have abolished or reformed the death penalty were affected by this campaign in some way. On the contrary, most of the Muslim countries have resisted this campaign, claiming that their legal systems must not contradict Islamic law, which explicitly recognizes the death penalty.<sup>10</sup> The Egyptian legislator should invoke Islamic law rules on the death penalty in order to be more consistent with the international campaign on capital punishment reform. Additionally, the Islamic countries should not oppose the international campaign, nor the various UN resolutions about the death penalty, by asserting their religious aspects.<sup>11</sup> Indeed, the Islamic law rules concerning the death penalty are consistent with many of the goals of the anti-death penalty campaign, and the Muslim countries are obliged to follow those rules.<sup>12</sup> Finally, Egypt – as a Muslim country that has a constitution obliging its legislature to enact legislation based on Islamic law sources – must conform to the contemporary international requirements of death penalty reforms.

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<sup>9</sup> See, Human Rights Watch, World Report, 2017, at [https://www.hrw.org/sites/default/files/world\\_report\\_download/wr2017-web.pdf](https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf). See also, Amnesty International Global Report, Death Sentences and Executions, 2016, at <https://www.amnesty.org/en/what-we-do/death-penalty/>. See also, UNOHCHR, Moving Away from The Death Penalty; Arguments, Trends and Perspectives, 2015, at <http://www.ohchr.org/EN/newyork/Documents/Moving-Away-from-the-Death-Penalty-2015-web.pdf>.

<sup>10</sup> William A. Schabas. *Symposium, Islam and the Death Penalty*, 9 WM. & MARY BILL OF RTS. J. 223, 231 (2000).

<sup>11</sup> Schabas, William, *Universal abolition; Only A Decade Away*, You Tube, (January 2014), <https://youtu.be/q7kwwyygA0A>.

<sup>12</sup> Schabas, Supra Note 6.

## **2. THE RULES THAT MUST BE FOLLOWED BY EGYPTIAN LAW TO RESTRICT THE IMPOSITION OF THE DEATH PENALTY IN EGYPT BASED ON ISLAMIC LAW**

This section will discuss the rules that should be imported from Islamic law to reform the imposition of the death penalty in the Egyptian legal system. The previous chapter discussed several such substantive and procedural rules that Islamic law provides for the death penalty – such as the victim’s family’s decision, the blood money policy, and the restriction of the execution to cases of intentional homicide.

### **A. Restricting the Death Penalty to Cases of Intentional Murder**

Egyptian law prescribes the death penalty for numerous crimes under several codes: criminal law, drug laws, weapons laws, terrorism laws, and military law.<sup>13</sup> Most of the capital crimes listed in these codes do not necessarily involve the death of the victim. Additionally, many of these crimes should not be classified as crimes serious enough to be punished by the death penalty. Egyptian law has several penalties that are sufficient punishment for these crimes, especially if they do not lead to the death of the victim, such as the penalty of life imprisonment. Moreover, the legal and logical justification for retaining the death penalty for these crimes does not align with the main philosophy of the Egyptian legal system for supporting the death penalty: The main argument for retaining the death penalty in the Egyptian legal system, and in most of the Islamic countries, is based on religious claims – even though Islamic law retains the death penalty only for intentional murder crimes, and not for the many other capital crimes that are stated in these codes.

In short, drug crimes, terrorism crimes, weapons crimes, and military crimes that do not involve intentionally taking the life of the victim should be outside the scope of the death penalty. Islamic

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<sup>13</sup> See chapter one.

law, which is the main basis for the retention of the death penalty in Muslim countries, only prescribes the death penalty for an offender who intentionally murders his victim. Egyptian legislation must be consistent with the Islamic law article of the Egyptian Constitution, and must limit the scope of death penalty to crimes where a deliberate homicide leads to death.

### **B. The Victim's Family's Decision about the Death Penalty.**

Article 18a of Law no. 150 of 1950<sup>14</sup> concerning the Egyptian criminal procedural law states, "The victim, his agent, or the inheritors [victim's family] may settle the reconciliation procedures before the general attorney in the crimes involving wrongful homicide, intentional assault, and battery, and this reconciliation leads to abatement of the legal action and elapsing of the criminal sanction as well. Moreover, the general attorney has the right to issue a decision to terminate the penalty against the offender, and release him, based on the reconciliation settlement between the offender and the victim's family."<sup>15</sup> Although this law gives the victim or his family the right to waive the penalty and settle the dispute under the supervision of the general attorney, the law is limited to crimes that do not lead to the death penalty. Unfortunately, the law of reconciliation between the offender and the victim's family does not include the crime of intentional murder. The law is only aimed at those categories of crimes that are not punishable by the death penalty.

Because the Egyptian legislature recognizes the right of the victim to waive the stated penalty for crimes that do not lead to the death penalty, we can say that the philosophy of the legislature aligns with the possibility of moving these particular categories of crimes from the public realm to the private right, or from the state's right to the individual victim's right. Namely, all of the crimes that are subject to the possibility of reconciliation between the offender and the victim are categorized as crimes

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<sup>14</sup> This article was amended by the law No 145 of 2006, conciliation law which gives the right to the offender and victim to conciliate before the general prosecutor to settle the dispute.

<sup>15</sup> Code of Criminal Procedure: Qanun al-ijraat al Jinayah (Egy CrimPC) art. 18a, law no. 150 of 1950.

regarding the rights of the public. It is therefore logical for the Egyptian legislator to extend the same possibility of reconciliation to include the crime of deliberate homicide.

In addition to the above-mentioned law of reconciliation, the history of the Egyptian people's customs regarding cases of murder indicates that these cases were mainly solved by reconciliation settlements between the victim's family and the offender's family. Until the most recent modern history of Egypt, most criminal cases were solved outside of the scope of government supervision, through a reconciliation settlement between the parties in dispute.<sup>16</sup> This is not to say that the government does not have the right to punish an offender who is convicted of homicide; however, it is imperative to note the significance upon the Egyptian legislature's philosophy of the Egyptian people's customs when considering whether to make reconciliation a possibility for the entire category of crimes against the public. It is worth mentioning that there are some Muslim countries that do allow for the abatement of the criminal legal suit based on reconciliation between the offender and the victim's family, without distinguishing between intentional and unintentional murder.<sup>17</sup> Surely these countries are affected by the Islamic legal rule that requires consideration of the opinion of the victim's family.

Since the Egyptian legislature gives the right to the disputing parties to reconcile some kinds of crimes to avoid the imposition of the penalty on the offender, and since the Egyptian people have a custom of settling homicide disputes through the reconciliation process, the Egyptian legislature should consider the opinion of the victim's family in cases of deliberate homicide as well. In short, the above-

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<sup>16</sup> Brower, Charles N., and Jeremy K. Sharpe. *International Arbitration and the Islamic World: The Third Phase*, The American Journal of International Law, vol. 97, no. 3, pp. 643–656, 2003. Retrieved from; [www.jstor.org/stable/3109849](http://www.jstor.org/stable/3109849).

<sup>17</sup> UAE, Article 20, Law No 35 of 1992 on the UAE criminal procedural law. Saudi Arabia, Art. 23, (2), of the Saudi procedural sanctions law. Sudan, Art. 36, (1), of the Sudanese Procedural criminal law, 1991. Kuwait, Art. 240 of the procedural criminal and sanctions law. See also, Foty, Cherine, *The Evolution of Arbitration in the Arab World*, Kluwer Arbitration Blog, July 1, 2015. Retrieved from, <http://arbitrationblog.kluwerarbitration.com/2015/07/01/the-evolution-of-arbitration-in-the-arab-world/?print=pdf>.



mentioned law of reconciliation must be extended to include deliberate homicide, and must give the right to the victim's family to decide whether or not the offender shall be punished by the death penalty. In other words, the legislature should give the judge the power to allow for reconciliation between the offender and the victim's family, so that it may be used to decrease the number of cases in which the death penalty is imposed.

### C. The Blood Money Right

As a corollary to the above mentioned right of the victim's family to decide whether or not the death penalty shall be imposed, Egyptian legislation should incorporate the blood money principle into Egyptian law. Most of the Muslim countries have a provision for blood money, which gives the right to the offender to pay money as his penalty with approval from the victim's family. Moreover, the customary practice of the Egyptian people, until very recently in modern Egyptian history, was to settle disputes between the victim's family and the offender's family based on blood money for homicide crimes.<sup>18</sup> Not only is there a constitutional obligation on the Egyptian legislator to adopt a blood money right, but there is also an obligation imposed by the customs and traditions of the Egyptian people.

Paradoxically, Egyptian criminal law does allow for some financial compensation to the victim's family even if no blood money right is established. Namely, in addition to imposition of the death penalty, the victim's family also has the right to bring a civil claim asking for financial compensation from the offender's family.<sup>19</sup> However, Islamic law does not allow for the combination of the death penalty and blood money – a choice between the two alternative penalties must be made.<sup>20</sup> In fact, Egyptian law does not name the financial compensation as blood money – but this means there is a contradiction

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<sup>18</sup> Peters, Rudolph, *Islamic and Secular Criminal Law in Nineteenth Century Egypt: The Role and Function of the Qadi*, Islamic Law and Society, vol. 4, no. 1, pp. 70–90, 1997. Retrieved from; [www.jstor.org/stable/3399241](http://www.jstor.org/stable/3399241).

<sup>19</sup> Code of Criminal Procedure: Qanun al-ijraat al Jinaiyah (Egy CrimPC) art. 253, law no. 150 of 1950.

<sup>20</sup> Auda, Abd al-Qadir, *Kitab al-tashri' al-djina'i al-islami muqaranan bi'l-qanun al-wad'i*, (English: *Islamic Criminal Law comparing to The Secular Law, Part2*), 638, Dar Al Katib Al Arabi.

between Egyptian law and the rules of Islamic law. To be more specific, Egyptian law does not provide for the blood money right for the offender to save his life from the death penalty, but at the same time it does not spare the offender's family from being obligated to pay money to the victim's family. It is worth mentioning that blood money is a legal provision in some other Muslim countries that allow the offender to pay it to the victim's family after their approval and waiver of the death penalty.

Contemporary Islamic law scholars say that the concept of the "family" may move from the literal meaning of the word to refer instead to the state. In other words, if the offender or his family are unable to pay the blood money to the victim's family, the government or the state is obliged to pay it on behalf of the offender.<sup>21</sup> Consequently, Egyptian law should enact an independent law regarding blood money rules that would organize the details of the issue, including setting the amount of the blood money. Also, when is the family forced to pay? When is the state obliged to pay it on behalf of the offender? Shall the offender pay it directly, or by installments? Shall the state oblige the offender to work to pay back the amount of the blood money? Shall the state oblige the victim's family to accept the blood money and waive the death penalty? All of these issues should be stated in an independent law for dealing with this issue. Finally, the blood money idea is a valuable idea that should be taken into consideration by the Egyptian legislature as a way to reform the death penalty, thereby achieving great progress on both the international and the local requirements of this penalty.

In short, blood money is both a constitutional and a customary obligation. The Egyptian legislature should provide for it as a strategic policy for limiting the scope of death penalty to cases of

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<sup>21</sup> Abu Zahra, Mohamed, *Al Uquba Fi Al Fiqh Al Islami*, (English: *Punishments in The Islamic Jurisprudence*), 500, Dar Al Fikr Al Arabi, (Cairo, 1998). See also, Qazamel, Seif Ragab, *Al'Aqela Fi AL Fiqh Al islami; Derasa Muqarnah*, (English: *The Concept of Blood relative's male in the Islamic Jurisprudence; a Comparative Study*), Al Isha'a Al Faniya Press, (Cairo, 1999). See also, Neawshi, Majed, *Tasawr Mua'sir Li Tahamul Al Diya 'an Al 'Aqela*, (English: *A Contemporary Hypothesis to The Blood Money*), Arab Law Info, (Amman, Jordan 2000).

intentional murder. In any event, the state still has the right to impose any sanction other than the death penalty against the offender, even after paying the blood money to the victim's family.

#### **D. The Continuous Evolution of Legislation**

One of the most important lessons that the Egyptian legislature should learn from Islamic law is the continuous evolution of Islamic law rules, corresponding to the developments of the requirements and needs of society. Namely, in most of the historical periods of Islamic law, Shariae was not an obstacle to the needs of society. These continuous evolutions started with the birth of Islamic law.

To illustrate: Islamic law prescribes the death penalty for deliberate homicides under the philosophy of retaliation that obliged societies at the time to kill the offender only when he killed the victim, soul for soul. During this time, the tribe of the victim used to kill tens of people as revenge for killing one of its members. Then the other tribe countered this revenge with another, which led to wars between the tribes for many years. Consequently, the Quran – the primary source – obliges the people to adopt the philosophy of retaliation, imposing the sanction only against the individual offender and not passing the right of killing to any other member of his tribe or family. In addition to the policy of revenge for the victim, the pre-Islamic societies did not recognize equality in the process of imposing the penalty; for example, a man was not killed for killing a woman. By prescribing the death penalty for deliberate homicides, Islamic law protected those societies from suffering continuous wars.<sup>22</sup>

Furthermore, the two primary sources of Islamic law associated the philosophy of lenity, forgiveness, and mercy for the offender with the victim's family for the death penalty.<sup>23</sup> As a result, the philosophy of

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<sup>22</sup> Bahnasi, Ahmed Fathei, *Al Qisas in the Islamic Jurisprudence*, (English: *Retaliation in The Islamic Jurisprudence*), Dar Al Shorouk, (Cairo, 1989).

<sup>23</sup> Quran says "O you who have believed, prescribed for you is legal retribution for those murdered - the free for the free, the slave for the slave, and the female for the female. But whoever overlooks from his brother anything, then there should be a suitable follow-up and payment to him with good conduct." *Al Baqra Chapter*, 1: 178. It also says, "And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives [up his right as] charity, it is an expiation

Islamic law, by prescribing the death penalty, was actually to restrict the execution to the offender, thus preventing the uninterrupted killing between tribes.

In addition to the main philosophy of the primary sources, Islamic law schools changed the laws to align with societies' needs. The prominent Islamic law scholars understood the main purposes of Sharia, the philosophy of the punishments, and the primary sources; therefore, they began to develop a set of rules, legal theories, and legislations for their respective societies under the umbrella of Sharia purposes and philosophy.<sup>24</sup> Some examples of legal scholars responding to society's evolving needs include Islamic criminal procedural rules, such as the victim's opinion; witnesses conditions; the offender's confession; the blood money right; the doubt maxim; the development of the "family" concept from the literal meaning to the wider meaning of the entire community; the obligation of the government to pay the blood money for the indigent offender; and the independence of the judicial system.<sup>25</sup> In short, Islamic law schools strove to make the Sharia rules more developed and more consistent with society's needs.

The lesson of adapting Islamic law rules to the evolving needs of society must be followed by the Egyptian legislature to update Egyptian laws to address the contemporary needs of the Egyptian community. as well as to address the evolving international values about the death penalty issue. Since the Egyptian legislature started to codify the laws, neither the substantive nor the procedural rules of

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for him", *Al Maeda Chapter*, 5: 45. Anas Ibn Malik narrated, "No case requiring retaliation was ever brought to the prophet, but he would enjoin pardoning". *Sunan an-Nasa'i*, 4784, Book 45, Hadith 79. See more at Chapter 2.

<sup>24</sup> Auda, Jasser. *Maqasid Al-shariah As Philosophy of Islamic Law: A Systems Approach*, London: International Institute of Islamic Thought, 2008.

<sup>25</sup> See, Rabb, Intisar A, *Doubt's Benefit: Legal Maxims in Islamic Law, 7th-16th Centuries*, Princeton University, Ann Arbor, (2009). Rabb, Intisar A, *Reasonable Doubt in Islamic Law*, Yale Journal of International Law 40.1, 41-94, (2015). Rabb, Intisar A, *The Islamic Rule of Lenity*, Vanderbilt Journal of Transnational Law 44, no.5, 1299-1351, (2011). Salama, Maamoun, *General Principles of Criminal Evidence in Islamic Jurisprudence*, in Bassiouni, Cherif, ed. *The Islamic Criminal Justice System*, 109-123, (New York, Oceana, 1982). Hallaq, Wael B, *An Introduction to Islamic Law*, Cambridge: Cambridge University Press, 2009. Feldman, Noah, *The Fall and Rise of the Islamic State*, Princeton: Princeton University Press, 2008. Hallaq, Wael B, *The Origins and Evolution of Islamic Law*, Cambridge, UK: Cambridge University Press, 2005.

the death penalty have been adequately reformed to be up to date with modern Egyptian society's development and international values.<sup>26</sup> Furthermore, comparing the contemporary substantive rules of the death penalty with the situation that prevailed one hundred years ago demonstrates that the current situation is even more severe and terrible.<sup>27</sup> Egyptian legislation on the death penalty should be reformed to be consistent with the contemporary developments in Egyptian society and in international human rights law.

### **3. CONCLUSION**

In conclusion, Article 2 of the Egyptian Constitution, as well as the social and cultural aspects of Islamic law, oblige the Egyptian legislature to consider the tragic issue of the application of the death penalty in Egypt. It is not only the substantive and procedural rules of Islamic law that must be followed by the Egyptian legislature, but also the process and mechanism of adapting the law to the nature of the communities that must be followed, if there is to be successful reform of the death penalty.

Additionally, basing the reform of the death penalty on the values, rules, and philosophies of Islamic law will achieve balance between Egyptian cultures, beliefs, and nature on the one hand, and the international campaign against the death penalty on the other hand. The nature of the Egyptian people is to accept suggestions, reforms, and legal commands based on their own religion and faith.

Finally, the Egyptian government and the other Muslim countries that are affected by Islamic law should stop opposing the international campaign for death penalty reform by claiming that the imposition of the death penalty is a religious ritual that cannot be opposed or reformed in Muslim

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<sup>26</sup> Ibid, Zanati, *supra* note, 6.

<sup>27</sup> Reprieve Organization, *Justice Denied: Mass trials and the death penalty in Egypt*, November 2015. Retrieved from; [https://www.reprieve.org.uk/wp-content/uploads/2015/11/2015\\_11\\_18\\_PUB-Egypt-Death-Penalty-Report.pdf](https://www.reprieve.org.uk/wp-content/uploads/2015/11/2015_11_18_PUB-Egypt-Death-Penalty-Report.pdf).

societies. Egyptian law scholars, Islamic law scholars, and Egyptian judges all must put forth the effort to propose the appropriate recommendations for death penalty reform in the Egyptian legal system.

# Conclusion and Recommendations

## 1. WHY SHOULD WE REFORM THE DEATH PENALTY IN EGYPT?

The current Egyptian political system, the obligation of the constitutional provisions, and the international campaign for death penalty reform provide the main motives that should compel us to consider reforming the death penalty in the Egyptian legal system.

Unfortunately, not only the current political regime, but also the governments that have ruled Egypt during the last century have insisted on abusing the use of the death penalty. The general and vague legal provisions on capital punishment represent a serious threat to the political opposition in Egypt. In addition to those people who were sentenced to death for political reasons, many other people have been threatened by this punishment, which represents an obstacle to political reform in the country. Furthermore, the number of times the death penalty is being imposed has dramatically increased as the political crisis in the country has become more dire. The recent political crisis following the 2013 military coup is an example of the direct relationship between the imposition of the death penalty and serious political problems.<sup>1</sup> In short, the abuse of the death penalty by Egyptian regimes is an obstacle to political reform in Egypt – and that should motivate us to hasten to reform this penalty, in order to save innocent people from being sentenced to the death for political reasons and also from being threatened or prevented from practicing political life in Egypt.

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<sup>1</sup> See more, Human Rights Watch, *Egypt: 183 Death Sentences Confirmed in Minya Case Makes Mockery of Right to Fair Trial*, June 2014. Retrieved from; <https://www.hrw.org/news/2014/06/21/egypt-183-death-sentences-confirmed-minya>. Human Rights Watch, *Egypt: Judge Issues Mass Death Sentences Court Condemns 188 Defendants for Police Station Attack*, December 2014. Retrieved from; <https://www.hrw.org/news/2014/12/03/egypt-judge-issues-mass-death-sentences>. Amnesty International, *Death Sentences and Executions 2014*, March 2015. Retrieved from; <https://www.amnestyusa.org/reports/death-sentences-and-executions-2014/>. Human Rights Watch, *Egypt; Events of 2016*, January 2017. Retrieved from; [https://www.hrw.org/sites/default/files/egypt\\_0.pdf](https://www.hrw.org/sites/default/files/egypt_0.pdf). Amnesty, *Egypt: Seven men facing imminent execution after being tortured in custody*, June 2017. Retrieved from; <https://www.amnesty.org/en/latest/news/2017/06/egypt-seven-men-facing-imminent-execution-after-being-tortured-in-custody/>.



In addition to the abuse of power that results in the greater use of the death penalty, the clear provisions of the Egyptian Constitution oblige the legislature to consider reforming both the substantive and procedural sides of the laws that relate to the imposition of the death penalty in Egypt. On one side, Article 2 of the Egyptian Constitution obliges the legislature to make Islamic law the main source for legislation;<sup>2</sup> namely, death penalty laws must be consistent with the Islamic law rules on the death penalty. For example, the legislature must provide for the blood money right and the victim's opinion right, and must also limit the death penalty to cases of deliberate homicide. On the other side, the Military courts' jurisdiction over Egyptian civilians,<sup>3</sup> as well as its extensive power to impose the death penalty against both civilians and military personnel, must be reformed to be in keeping with the general rules of the Egyptian Constitution.<sup>4</sup> Egyptian civilians must be subject to the civilian courts when charged with crimes that may lead to the imposition of the death penalty. In short, both the principles of the Egyptian Constitution and its provisions oblige the legislature to reform all of the codes that include the death penalty as a possible punishment, due to the legal defects of most of these codes.

In addition to the constitutional obligation and the abuse of the use of the death penalty, the Egyptian legislature must also consider the main philosophy behind the Egyptian codes when they were first enacted.<sup>5</sup> In the beginning, the number of crimes that were punishable by death, as well as the philosophy that was adopted by the legislature in enacting the Egyptian codes, were not aimed at

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<sup>2</sup> Constitution of the Arab Republic of Egypt [Egypt], 18 January 2014, available at; [https://www.constituteproject.org/constitution/Egypt\\_2014.pdf?lang=en](https://www.constituteproject.org/constitution/Egypt_2014.pdf?lang=en).

<sup>3</sup> See, Human Rights Watch, *Egypt: 7,400 Civilians Tried in Military Courts; Torture, Disappearances Used to Elicit Confessions*, April 2016. Retrieved from; <https://www.hrw.org/news/2016/04/13/egypt-7400-civilians-tried-military-courts>.

<sup>4</sup> See, Human Rights Watch, *Cancel Military Court Death Sentences; Convicted Civilians Alleged Torture, Forcible Disappearances*, June 2017. Retrieved from; <https://www.hrw.org/news/2017/06/11/egypt-cancel-military-court-death-sentences>.

<sup>5</sup> Anderson, J. N. D, *Law Reform in the Muslim World*, London: Athlone Press, 1976. Al Awa, Mohamed Selim, *Fi Usul Al Nizam Al Jinaei Al Islami* (English; *The Origins of the Islamic Criminal Legal System*), Nahdet Masr Press, (Cairo, 2006). 'Ibid, Raouf, *Mabadiea Al Qism Ala'm mina al Altashriea' Al Iqabi Al Masry* (English, *The Egyptian penal legislation; the general section*), Nahdet Masr Press, (Cairo, 1964).

allowing the death penalty to be imposed for these tremendous numbers of crimes. In other words, when the Egyptian laws were codified for the first time in the 18<sup>th</sup> century, they were mainly derived from French, Italian, and Indian laws<sup>6</sup> – all of which are legal systems that abolished the death penalty a long time ago. Additionally, moving away from the origins of the Egyptian laws and codes, the current constitutional developments should motivate the Egyptian legislature to work on reforming the death penalty – substantively and procedurally – to be commensurate with the main philosophy of the Egyptian Constitution. In short, the current application of the death penalty in Egypt contradicts both the origins of the Egyptian legal codes and the contemporary evolution of the Egyptian Constitution and laws.

Finally, the need to reform the death penalty in Egyptian law, and in other Muslim countries' laws, is consistent with the international campaign against the death penalty that is being run by the UN and other international organizations. These international organizations continue to classify Muslim countries as one of the main countries that still impose the death penalty. Additionally, the international campaign – due to the position of certain Muslim countries' governments regarding the death penalty – claims that Islamic law is an obstacle to death penalty reform in countries such as Saudi Arabia, Iran, Pakistan, and Egypt. In addition to these claims of the international campaign, most of the UN resolutions on the death penalty are opposed by the Egyptian government, and by other Muslim countries as well.<sup>7</sup> Indeed, the abuse of use of the death penalty in these countries, in combination with the alleged religious arguments defending the death penalty, lead many to believe that Islamic law is the main obstacle to death penalty reform in these Muslim countries. Therefore, the need to reform the death penalty is an important solidarity message with the international campaign – one that would

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<sup>6</sup> *Id.*

<sup>7</sup> Schabas, William, *Universal abolition; Only A Decade Away*, You Tube, (January 2014). Retrieved from; <https://youtu.be/q7kwwyygA0A>.

serve to confirm that Islamic law has actually been calling for the reform of the death penalty, and that the largest obstacle to this reform are the regimes of these countries.<sup>8</sup>

In short, the internal factors – such as the abuse of power allowing for the exploitation of the death penalty, the constitutional obligations, and the main philosophy of the contemporary Egyptian constitution and laws – as well as the international factors such as the campaign against the death penalty, provide the main motives that should compel the Egyptian legislature to reform the death penalty so that it is consistent with both the international requirements and the municipal needs.

## **2. WHY THE ISLAMIC LAW?**

The suggested solutions for reforming the death penalty in Egypt are mainly dependent on Islamic law, for legal, social, cultural, and practical reasons. In other words, not only is there a constitutional obligation on the legislature to depend on Islamic law, but also an obligation based on the evolving cultural and social nature of Egypt, the appropriate practical solutions provided by Islamic law, and the Egyptian peoples' reception to death penalty reform. These are the main reasons for basing death penalty reform on the basis of Islamic law.

**First**, the main legal consideration for building the reform of the death penalty on Islamic law is Article 2 of the Egyptian Constitution, which states that Islamic law is the main source for legislation. So, the entire process of enacting Egyptian laws, as well as the reform of the laws, must be consistent with Islamic law sources; otherwise, these laws will be contrary to the Egyptian Constitution.<sup>9</sup>

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<sup>8</sup> Karimunda, Aimé Muyoboke, *The Death Penalty in Africa: The Path Towards Abolition*, Farnham, Surrey, England: Ashgate, 2014.

<sup>9</sup> See, Cases no. 67, 68, of Sep. 7, 1996, The Supreme Constitutional Court (*Al Mahkama Al Dustoriya Al Uliya*) [Egyptian Judicial review] no. 8, p. 133. Case no. 26, of Nov. 16, 1996, The Supreme Constitutional Court (*Al Mahkama Al Dustoriya Al Uliya*) [Egyptian Judicial review] no. 8, p. 162. Case no. 34, of Jan. 4, 1997, The Supreme Constitutional Court (*Al Mahkama Al Dustoriya Al Uliya*) [Egyptian Judicial review] no. 8, p. 209.

**Second**, the social consideration refers to the fundamental nature of the Egyptian society to welcome any reform to the death penalty based on Islamic law, rather than on any outside sources. Namely, the international human rights push for the abolition or restriction of the death penalty in Egypt and other Arabic communities is not an easy call to be accepted, nor is it welcomed, due to cultural, historical, and religious factors associated with these societies. However, if the call for reform is based on the internal religion, belief, and faith of these societies, these calls will be more successful at achieving reform.<sup>10</sup> Indeed, the Egyptian people do not fully trust the international campaign for death penalty reform that has Western origins – but they will be more receptive to those reforms that are built on Islamic law sources. In short, Islamic law is more accepted by Egyptian societies, due to the coexistence of their cultures, beliefs, identities, and faiths within the rules of Islamic law.

**Third**, Islamic law neither calls for absolute abolition nor absolute retention of the death penalty. The main philosophy of Islamic law takes a middle ground between the retention and the abolition of capital punishment. In other words, before urging the victim's family to forgive and waive the death penalty, Islamic law first considers the right of the victim who was deprived of his right to life by this offender, and then gives the right to the victim's family either to approve or to waive the death penalty while weighing the possibility of forgiveness. So, this philosophy toward the imposition of the death penalty is consistent with Egyptian culture and nature: the fact that the people have the power of forgiveness, according to the legislation, is enough to support the death penalty abolition. Conversely, preventing the people from the right to decide whether to forgive or not would result in them to resisting any legal effort to abolish the death penalty in Egypt. Thus, the philosophy of adopting a middle point between retention and abolition of the death penalty is consistent with the nature of Egyptian communities as well as other Arab societies.

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<sup>10</sup> See, Gallup World Poll, *Special Report; Muslim World*, The Gallup Organization Princeton, 2006. Wasti, Tahir, *The Application of Islamic Criminal Law in Pakistan: Sharia in Practice*, Leiden: Brill, 2009.

**Fourth, and finally**, the practical reason for basing the reform of the death penalty in Egypt on Islamic law is that it is derived from the Sharia, which has various solutions and alternative options for the death penalty.<sup>11</sup> Thus, the Egyptian legislature has various practical tools to use to achieve reform – including the blood money theory, the victim’s family’s opinion, the restriction of the death penalty to limited crimes, and the developed efforts of Islamic law toward the use of the death penalty. Additionally, these recommendations and suggested solutions for the reform of the death penalty are more practical, because they align more closely with the history, culture, and traditions of the Egyptian community. Some of these suggested solutions have already been applied in the Egyptian community, such as the blood money, the criminal reconciliation resolutions, and the victim’s family’s opinion. In short, the Islamic law perspective on the death penalty is more practical – because these suggested ideas align with Egyptian traditions and cultures.

### 3. RECOMMENDATIONS

The death penalty is a complicated and controversial issue that must be approached from different perspectives, aspects, and angles. A quick review of this paper shows that there are multiple factors that led to the current death penalty crisis in the Egyptian legal context. In addition to the exploitation of the death penalty by several Egyptian governments, there were also the law professors, the Islamic law scholars, and the continuous political crises. Other issues that led to the deterioration in the application of the death penalty in Egypt include the military doctrine that carried through multiple regimes, the relative absence of democracy, the governmental bureaucracy, and the accumulation of ideas that the Egyptian community has toward the death penalty. Indeed, the advocacy of reform must be addressed to all of these people and must consider all of these factors.

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<sup>11</sup> See, chapter two.

**First**, the Egyptian legislature must respect the supremacy of the Egyptian Constitution and the judgments of the Egyptian Supreme Constitutional Court, by amending Egyptian laws to be consistent with Islamic law rules and principles.<sup>12</sup> In other words, the death penalty application should be subject to the theories and rules that are stated in Islamic law. Additionally, the Egyptian legislature must work on limiting the jurisdiction of the Military courts over Egyptian civilians, as well as restricting the death penalty application under the Egyptian Military Rules Law. The Special State Security courts have no place in any democratic system, and should be eliminated from the Egyptian legal system entirely. Finally, in addition to limiting the death penalty to cases of deliberate homicide, the Egyptian legislature must work on reforming the vague and ambiguous terms in death penalty statutes. In short, the Egyptian legislature bears a large share of the responsibility for the death penalty reform through different roles, different responsibilities, and different avenues.

**Second**, the legal professoriate has an important role to play in reforming the death penalty in the Egyptian legal system. Due to the civilian nature of the legal system in Egypt, the legal studies of those professors are the main source for judges, law students, lawyers, and legal activists to understand the Egyptian legal system. Unfortunately, most of these legal studies do not discuss the death penalty issue from different perspectives; they are merely repeating the same arguments, which have been alleged since the 1960s, without being innovative when discussing this important issue. Consequently, all of these traditional ways of dealing with the death penalty have affected lawyers, law students, judges, and legal activists, who often repeat the same tired arguments of the legal scholars. In short, the death penalty has not been studied enough by Egyptian law professors, who have influenced everyone in the field of legal studies to have a negative attitude toward the calls for death penalty reform. The law schools, the legal studies centers, and the law professors must consider this issue from different aspects

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<sup>12</sup> The Supreme Constitutional Court, *supra* note 9.

and viewpoints, and must stop repeating the same arguments that have been made for decades to convince contemporary societies that they still need the death penalty.

**Third**, in addition to the role of the Egyptian legislature and the legal scholars, Islamic law scholars and foundations will be required to play a role in reforming the death penalty. Since most of the arguments to retain the death penalty relate to Islamic law in some way, Shariae scholars have an important role in clarifying the real theory of the death penalty in Islamic law. Islamic law scholars should follow the steps of the classical Islamic law schools by developing the Islamic law rules to be consistent with the contemporary philosophies and law theories of developed societies. Additionally, the government should stop using the speech of some Islamic law scholars who are working for governmental associations, and who argue that the death penalty law should remain as is because it relies on Islamic law and therefore shouldn't be opposed. In short, the Islamic law associations and schools must work to refute the misconception that the death penalty in Egypt, as it is currently codified, is consistent with Islamic law practices, and must reveal the true position of the Shariae toward the death penalty as well.

**Fourth, and finally**, the international and local human rights organizations that advocate for death penalty reform must work on connecting all of these composite factors and these different people, if they wish to be successful in achieving their goals. Indeed, working on one specific factor while ignoring the others is a futile attempt to achieve the aimed reforms. Besides, the attacks of these organizations on Islamic law – as if the Islamic law is the source for the abuse of the death penalty in Egypt – is not an appropriate way to reform the death penalty in Egypt. The human rights organizations must take into consideration that Islamic law scholars and schools in Egypt must take the first step in the process of reforming the death penalty. The Egyptian people will not accept any solution that is totally separate from the instructions of their faith sources – namely, Islamic law. In short, the organizations who wish to reform the death penalty in Egypt must engage with Islamic law scholars and religious

foundations, because only they possess the power to convince the Egyptian community, the Egyptian government, the Egyptian legislature, and the Egyptian law activists of the necessity of reforming the death penalty in Egypt.

In conclusion, the current application of the death penalty in Egypt is a catastrophe due to its abuse by the government. The responsibility for the reform process falls on different aspects of Egyptian society. The Egyptian legislature bears the biggest share of the responsibility; however, Islamic law scholars, Egyptian law professors, judges, lawyers, and human rights organizations also have a great responsibility to raise legal awareness about the death penalty in Egyptian society. Furthermore, Egyptian society needs to understand that the current application of the death penalty in the Egyptian legal system is contradictory to Islamic law rules, and the reform of the death penalty is an Islamic obligation on these societies. The Egyptian society must be aware of the Quranic concept, “And whoever saves one – it is as if he had saved mankind entirely,”<sup>13</sup> and must see the legal application of this concept in the Egyptian legal system. Egyptian society must understand that the current tremendous numbers of crimes that are punished by the death penalty; the absence of due process in death sentencing; and the existence of the Special State Security courts all contradict the basic principles of Islamic law that the Egyptian Constitution provides must be the main source for all legislation. The Egyptian community should understand that Islamic law plays no role in the abuse of the death penalty by those currently in power, and that the main obstacle to death penalty reform is the sequence of different political regimes that have ruled Egypt for decades.

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<sup>13</sup> Quran, Al Maeda chapter, 5:32.



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